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# The dark side of desktop: Detection and prevention of forgery and counterfeiting in the age of desktop publishing

Philip Lynn Potts

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**The Dark Side of Desktop:  
Detection and Prevention of Forgery and Counterfeiting  
in the Age of Desktop Publishing**

by Philip L. Potts

A thesis project submitted in partial fulfillment of the  
requirements for the degree of Master of Science in the  
School of Printing Management and Sciences in the  
College of Imaging Arts and Sciences  
of the Rochester Institute of Technology

November 1994

Thesis Adviser: Professor Frank J. Cost

School of Printing Management and Sciences  
Rochester Institute of Technology  
Rochester, New York

**Certificate of Approval**

**Master's Thesis**

This is to certify that the Master's Thesis of

Philip Lynn Potts

With a major in Graphic Arts Publishing  
has been approved by the Thesis Committee as satisfactory  
for the thesis requirement for the Master of Science Degree  
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*November, 1994*  
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The Dark Side of Desktop:  
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October 1994



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## Abstract

This thesis project explores the ways in which new printing and desktop publishing technologies can be used in the forgery and counterfeiting of security documents, and how much protection certain security features provide against the tools of electronic publishing. For the purposes of this project, a security document is defined as any document of value with built-in features meant to discourage counterfeiting and facilitate limited reproduction. Possible countermeasures used to identify and defeat forgeries are also discussed. To accomplish this, a variety of means are used such as color copiers, scanners, conventional photocopiers, and desktop publishing computers and software.

The security features looked at are on a press sheet provided by the Wicker Group, a Rochester, New York company specializing in the development of security features for both private industry and the federal government. The sheet is a mockup document that contains a number of security features that are both currently in use and in development.

Three different scanners were used in the study: the Agfa Horizon flatbed scanner, the Hewlett Packard Scanjet IIc flatbed scanner, and the Optronics Color Getter II Pro drum scanner. Three output devices were studied: the Tektronix Phaser IIIpxi, the Canon CLC 500 with Fiery RIP, and the 3M Rainbow digital proofer. The Wicker image was scanned and saved in EPS (encapsulated PostScript) and TIFF (tagged image file format) at varying scan settings. No color correction or manipulation was made to any of the scans.

The images were placed into Quark XPress 3.2 and 3.3 files and output to the three printers.

In looking at the outputs, the main objective was to produce a copy that would be considered “passable;” that is, a reproduction that most likely would not pass a rigorous inspection, but would pass a cursory one. The resulting outputs showed varying degrees of resistance to the security features in the Wicker document, though passable copies were indeed produced.

## Chapter 1

### Introduction

The problem of counterfeiting has been around for as long as there has been printing. For every document society places a value on, there will be a criminal element that will attempt to duplicate it for ill gain. However, until only recently the problem has been confined to a relatively small number of criminals who have had access to the complicated processes of printing. Offset lithography, gravure, and intaglio printing are highly technical processes which require skilled operators and expensive equipment. The purchase of the inks and papers used to produce documents such as checks and passports can be controlled, and access to them limited by agencies such as the Department of the Treasury or the Bureau of Engraving and Printing. The act of counterfeiting was a laborious and complex process. The tools of the counterfeiter were frequently bleach, razor blades, and small basement offset presses. Overall, the quality of forged documents and money was poor compared to the original, and relatively easy to detect.

In the 1980s, however, two new tools became available to the printing industry: the Macintosh computer, and the laser printer. The graphical user interface and available PostScript typefaces of the Macintosh meant that for the first time, type could be displayed on screen exactly as it would be printed. Now, anyone could generate high quality documents from their desktop, in their living room, or in school. The bad news, of course, was that anyone could also print up authentic looking certificates and identity papers, for example. With scanning technology and color printers, one could easily alter the amount on a check from

\$10 to \$10,000 and produce a passable forgery. Why go to the trouble of scanning and creating, though, when all one has to do is use a color copier to reproduce an authentic-looking forgery?

Banks, printers, and law enforcement agencies are keenly aware of this problem, and are exploring means to counteract it. Being able to detect and counteract this type of forgery not only has economic implications, but security implications as well. A terrorist who could produce an access pass to a military base, for example, could cause major problems and possibly threaten lives. The problem faced is the "bad seed" of the current trend in on-demand publishing; instead of one person producing a million counterfeit documents, we could potentially face a million people, each producing one counterfeit document (*Nova* 1992).

Security features currently in use are primarily designed to defeat color copying technology, and most are effective against them – particularly those embedded into the substrate itself. However, many of the features that are added during the printing process itself such as inks and printed patterns are the easiest to reproduce.

According to the Secret Service, \$17.3 million in counterfeit bills were passed during 1993 – a relatively small number compared to the \$100 billion of US currency that is printed annually (*USA Today* 1994) . A more pressing area of concern is the forgery of checks and other securities. The value of forged checks seized by the US Secret Service in 1992 exceeded \$56 million (*Sourcebook of Criminal Justice Statistics* 1992, pg. 552). Checks issued by the US Treasury contain security features, but private industry is another matter. Unlike currency, there is no standard for security features for checks. Any printing company can print

checks, as long as they conform to the regulations of the Federal Reserve for endorsement areas and numbering.

The most prevalent counterfeiter is likely to be a "casual counterfeiter," someone who has access to a color copier or printer at the office, and is typically copying no more than a few hundred dollars worth of bills (Snow 1994).

## **Chapter 2**

### **Statement of Problem**

Security features are in place right now to protect against the primary tool of the modern counterfeiter, the color copier. However, they have not been tested against the tools of electronic publishing, such as the desktop computer, the scanner, the color printer. The focus of this project is to determine how much protection these features provide against these tools, and to evaluate the threat, if any, that exists to current security features due to the wide popularity and availability of these tools.

the Netherlands can keep track of exactly which bills and how many of them are in circulation at any given time (*Nova* 1992).

Traditionally, United States currency has been the easiest in the world to counterfeit (*Nova* 1992). With the exception of the Treasury seal, the bill is printed entirely in one color. The counterfeiter may not be able to match it exactly, but then again, an exact match may not be needed. A counterfeit \$20 bill may not even be noticed at a crowded restaurant on a Friday night, for example. The pictures on the bills are smaller than those on the currency of other nations, making it more difficult to notice anything unusual. In addition, traditionalism has allowed the design of the currency to remain static for nearly a century. Other nations change the design of their currency on a regular basis, typically every five years or so (*Nova* 1992).

United States currency since 1990 has incorporated a number of security features to combat the growing trends in color copying technology. Fifty and \$100 bills produced since 1990 contain two new features, microprinting and a version of the polyester security thread described above. Within the next few years, the features will be added to the \$10 and \$20 bills (U.S. Department of the Treasury 1991).

The words "United States of America" are printed around the periphery of the portrait on the bill, appearing as a solid border to the unaided eye at normal reading distance. When the bill is held closer to the eye or magnified, the words become visible. When the bill is copied, dot gain causes the words to run together into an unreadable mass (U.S. Department of the Treasury 1991).



The polyester security thread is embedded into the left side of the bill. The clear strip contains the denomination of the bill, along with the initials "USA" visible from both sides of the bill. Because the strip is woven into the paper, it is very difficult if not impossible to reproduce by any conventional means (Karol 1993).

United States currency is printed on paper embedded with small red and blue fibers. The paper contains 75% cotton and 25% denim, and is produced in one location in Massachusetts to control the supply of stock (*USA Today* 1994). Because of the randomness of the placement of the threads, embedded security threads are impossible to reproduce accurately without this paper. An added bonus of the high cotton content is that substrates used by counterfeiters are fluorescent under ultraviolet light, making it a relatively easy matter to detect a counterfeit bill (*Nova* 1992). A real bill will not fluoresce.

Induced moiré is an invention of the Wicker Group of Rochester, New York. A series of printed patterns is added to the background of the document, calibrated to the scan lines of a color copier. The patterns are invisible to the eye, but when the document is copied, the moiré pattern is clearly visible on the copy. These patterns can be customized to produce banding or spell out a word such as "VOID" (*Coin World* 1994).

The Department of the Treasury and Bureau of Engraving and Printing have only recently begun research into the use of desktop publishing means as a use of both creating and thwarting security features. Even in private industry, there is a relatively small number of companies that perform research in this area. American Bank Note of Pennsylvania is the only firm in the United States with a dedi-

## Chapter 4

### Review of Current Security Features

The most effective security features are those which are built into the substrate of the document itself. One of the most common and most effective is watermarked security paper. The watermark can be customized to include a corporate logo, a particular pattern, or a similar unique mark. Watermarks are desirable because of their controllability and their aesthetic value. They can only be added during the papermaking process, and are impossible to remove or reproduce by printed means (Moore 1991). Watermarks can also be made using ultraviolet inks. To the naked eye they are invisible, but are plainly visible when viewed under a UV or “black” light. These can be applied during the printing process as a spot color or varnish and add very little cost to the overall print job (Moore 1991).

Typically, a security document will have intricate borders or patterns printed with fine hairlines that are difficult to reproduce. These borders are usually hand-etched or engraved, though in the future we can expect to see more borders of this type done electronically (*Nova* 1992).

Iridescent printing is a process that a number of countries, most notably the Netherlands, have adopted for use in their currency. This method uses techniques such as linear blends to produce patterns of color that are difficult to reproduce (Moore 1991). The Netherlands have also introduced barcoding to their currency. Each bill has its own unique barcode containing the bill’s serial number. Currency that goes through the nation’s treasury system is

routinely run through a barcode scanner before being placed back into circulation. In this way, the Netherlands can keep track of exactly which bills and how many of them are in circulation at any given time (*Nova* 1992).

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The Department of the Treasury and Bureau of Engraving and Printing have only recently begun research into the use of desktop publishing means as a use of both creating and thwarting security features. Even in private industry, there is a relatively small number of companies that perform research in this area. American Bank Note of Pennsylvania is the only firm in the United States with a dedicated electronic prepress system that is used to create security features for currency, securities, and identity documents (Thaler 1994). Their Agfa-based system allows for creation of intricate borders and security designs electronically, as opposed to the traditional hand-etched methods. These security designs can be stored electronically and retrieved and modified for use in other documents. The company prints documents such as stamps, checks, and stock certificates in significantly less time and with finer detail than can be achieved through traditional means (Thaler 1994).

In July 1994, the Bureau of Engraving and Printing and the Treasury Department announced the first major changes to United States currency since the Great Depression. The changes, to be implemented after 1995, will be specifically designed to thwart high-tech means of counterfeiting. The portrait on the bill will be approximately 50% larger and moved to the slightly to one side, similar to the portraits on the currency of other countries. A color shifting ink will be used that appears a different color when viewed from an angle but green when viewed normally. In addition, small light-reflecting discs will be placed in the paper itself. These discs show up as black on a copy, and because of their size and composition are difficult to reproduce with any device dependent upon reflected light such as a scanner or copier (Fix 1994).

## Chapter 5

### Methodology

The focus of the study was limited to the types of desktop publishing software and hardware that are accessible to the average person now or will be within the next few years. Hardware was limited to Macintosh systems because of their superior graphics handling capability compared to Windows-based systems. The Macintosh Quadra 950 was used because of its speed and large memory capacity.

The Wicker press sheet 5193853 was printed offset litho. It is a mockup of a hypothetical security document, such as a bond or stock certificate. The document contains the following security features:

- Intricate, engraved-style borders.
- A prominent engraved-style picture ("the Princess") contained within a seal pattern.
- Induced moiré in the main field, producing the word "VOID" when copied.
- Induced moiré in the borders and the seal area, which produces a distinct banding pattern readily visible to the eye when color copied.
- A cross-hatched induced moiré field at the bottom of the document that breaks up into blocks of color when copied.

The document was scanned into TIFF (tagged image file format) and EPS (encapsulated PostScript) formats and imported into Quark XPress 3.2 and 3.3

documents. No color correction or manipulation was applied to any of the images. The images were output to three devices: the Tektronix Phaser IIIpxi, the Canon CLC 500 with Fiery RIP, and the 3M Rainbow digital proofer. The resulting outputs were then visually compared to the original for evidence of induced moiré effects, color shifting, or other visual evidence that would make the document recognizable as a reproduction.

## **Chapter 6**

### **Results**

#### **Color Copying**

Figure 1 is the original Wicker press sheet. (All Figures are located in "Appendix B, Illustrative Material Figures 1-16"). Figure 2 is a color copy of the press sheet color copied on a Canon CLC 500. This is easily distinguishable as a counterfeit due to the appearance of the word "VOID" in the main field. The light blue patterned background dropped out and distinct banding patterns in the border areas and the Princess seal. Induced moiré was designed to defeat color copiers, and it does an excellent job of producing a totally unusable copy.

#### **Scanning**

For the study, three different varieties of scanner were tested. The Hewlett Packard ScanJet IIc was used as an example of how well a relatively inexpensive flatbed desktop scanner would handle a complex security document. The ScanJet is a single-pass CCD scanner capable of handling relatively simple color requirements. The DeskScan II 2.0 software that drives the scanner is simple to use, yet does not offer a great many options in terms of image calibration. A scanner such as this would be the most attractive to the desktop counterfeiter due to its ease of use and its low price tag - in the \$1600-\$2000 range.

The Agfa Horizon is a higher end, more expensive flatbed scanner. It can scan in multiple passes to accommodate a variety of color space needs (CMYK, RGB, YCC). Driven by FotoLook 2.0 software, the scanner provides accurate color calibration and color adjustment, though with a price approaching \$20,000 it would be a bit expensive for the average person.



One trend in color publishing is the desktop drum scanner, and the Optronics Color Getter II Pro was used to provide examples of this technology. These scanners provide the most accurate color reproduction, and provide the highest resolution available - for this particular model, up to 4064 lines per inch (lpi). Its \$45,000+ price tag, though, would make it accessible only to a counterfeiter who (a) had access to a high end service bureau, (b) had the resources and the wherewithal to spend such a large sum of money, such as organized crime rings or South American drug cartels, or (c) could steal one. In the future, though, as these scanners become more prevalent in even the lower end prepress houses, these high-resolution scanners will come down in price and accessibility. Already, ScanView offers a 2000 dpi drum scanner for \$13,000 (*Color Publishing*, May / June 1994, pg. 21).

One issue with the higher end scanners is the large file sizes associated with the amount of color information stored within a security document. The Wicker press sheet was scanned in both TIFF (tagged image file format) and EPS (encapsulated PostScript) formats on all three scanners, and the average file size for each is displayed below:

**Table 1: Average File Sizes**

	<u><b>ScanJet IIc</b></u>	<u><b>Agfa Horizon</b></u>	<u><b>Optronics Color Getter</b></u>
TIFF	606K	7.0 Mb	7.0 Mb
EPS	3 Mb	30.5 Mb	9.6 Mb

The issue of file storage can clearly become imperative if a number of files are involved. Adding in the cost of a suitable storage medium such as a magneto-optical disk drive or a removable hard drive can drive the price of a system up another \$1000 - \$3000.

## **Output Devices**

The tool of choice for the counterfeiter in recent years has become the color copier, and with devices such as the Fiery RIP (raster image processor) and the Cyclone RIP, these machines can be turned into good quality 400 dpi (dots per inch) color output devices.

Figure 3 was scanned on the Agfa Horizon and output on the same CLC 500 used to copy Figure 2. In this example, the CLC was used as a color printer, connected to a Fiery RIP. The scan was placed into Quark XPress 3.3 and printed using the built-in EFIColor profile for the CLC 500. No adjustments were made to the image in Quark. The resulting output shows an interesting phenomenon - the induced moiré so readily visible in the color copy no longer appears in the main field of the printed output, even though the output devices are the same machine. The top and bottom borders show no induced moiré, although the left and right have distinct banding. The background did not drop out completely, and an obvious color shift is apparent.

The Tektronix Phaser IIIpxi is a solid-ink jet printer capable of producing 300 dpi on a wide variety of substrates. As seen in Figures 4-6, there is an overall slight color shift when the document is printed out on the Phaser. The wax process leaves a slightly textured, grainy feel on the substrate, and this factor alone

would make any document printed with this method almost immediately suspect. The highest resolution settings from the HP ScanJet were used - "Millions of Colors" and "Color Photo," and the scan was saved in two file formats - TIFF and EPS. Figure 4, TIFF/Millions of Colors, preserves the most detail in the intricate border areas and in the Princess seal, though upon closer inspection the finer edges and lines are broken up and jagged.

Figures 7-11 were scanned on the Optronics Color Getter II Pro at five different apertures and output to the CLC 500. The aperture setting refers to the number of pixels sampled by the scanner in a given area during a scanning pass. The higher the aperture number, the greater the sampling rate. At lower settings, the interference lines are more apparent because there is less overlap between the pixel area sampled. As the aperture settings increase, detail is gained and the banding gradually fades out, but beginning at an aperture of 200 the image gradually shifts out of focus. The interference lines are crowded out due to the increased area of sampling, but the finer details are lost. Each of the documents shows a distinct yellow cast overall.

Figures 12-14 were scanned on the HP ScanJet IIc at the same settings and in the same file formats as Figures 4-6. The output device here was the CLC 500, and again the TIFF/Millions of Colors setting holds the greatest amount of detail. Again, the color is off and areas of the image - particularly the bottom field appear out of focus, but the induced moiré patterns are not noticeable at all.

Of the three types of output devices, the 3M Rainbow dye-sublimation digital proofer produces the best quality image. For the purpose of this study, it has two major drawbacks: (1) it only prints on a single size and type of paper, and (2) the

image has a glossy, continuous-tone appearance. Figure 15 is a Rainbow proofer output of the Wicker press sheet, printed out at the highest resolution settings. A visual inspection of the proof reveals none of the induced moiré effect so readily visible in the color copy. However, there is a distinct color shift, and detail is lost in the borders and in the intricate patterns surrounding the Princess. Figure 16 is a color copy of Figure 15, and the resulting copy shows a general washed-out appearance, color shifting, and an extreme loss of detail.

The issue of printing times for the image was addressed by timing how long each output device required to print the highest resolution, best-quality version of the Wicker scan. RIP time refers to the amount of time spent waiting for the computer to send the image to the processor, and how much time the printer spent processing the document. Printing time refers to how much time was actually spent putting ink onto the substrate. The CLC 500 and the Rainbow proofer apply all their colors in four passes, while the Phaser IIIpxi relies on a wax transfer process that requires considerably more time.

**Table 2: Average Print Times**

	<b><u>Canon CLC 500</u></b>	<b><u>Phaser IIIpxi</u></b>	<b><u>3M Rainbow Proofer</u></b>
RIP Time	4 min.	8 min.	35 min.
Printing Time	<u>1 min.</u>	<u>6 min.</u>	<u>3 min.</u>
<b>Total</b>	<b>5 min.</b>	<b>14 min.</b>	<b>38 min.</b>

In summary, only the higher end equipment produced images that were anything approaching passable. The lower end, and therefore more accessible, hardware produced images that would be readily recognizable as counterfeit. Printing speed is not as crucial an issue with, for example, a single forged pass-

port as it is with currency. In order for the reproduction of currency to be practical, a large amount must be produced, and as with any print job, productivity is an issue. How much time would a counterfeiter be willing to spend color correcting, cleaning up, and printing out an image, with the potential threat of discovery and arrest looming overhead?

## Chapter 7

### Recommendations on How the Features Can be Improved

Presently, color copier manufacturers such as Canon and Xerox are working on and implementing devices in their color copiers that will allow these machines to recognize currency. Security features could be built into the scanners and RIPs (raster image processors) of color printers and other such devices, so that even if the features on the document itself are defeated, the device itself could act as a security feature.

As stated above, the most effective security features are those which are embedded in the substrate of the document. Even the highest end drum scanner cannot duplicate the raised feel and look of a watermark. Color shifting watermarks are impossible for a scanner to reproduce accurately, and they cannot be added "after the fact."

Induced moiré is very effective against color copiers, but as seen in Figure 6 a high end scanner is able to reduce its effectiveness. The image in Figure 17 is uncorrected and unmanipulated, and someone with a high level of competence in Photoshop would be able to produce an authentic looking image. Adjusting the moiré pattern so that it is calibrated to the scan pattern of some of the most common scanners would make it a more effective device against the electronic counterfeiter.

## Chapter 8

### Legal Issues

As stated above, counterfeiting in the United States reached its peak during the Civil War. Title 18 USC § 474 was passed by Congress at the beginning of the war to protect the integrity of the currency during this economically trying time. It provided federal criminal penalties for anyone who

... prints, photographs, or in any other manner  
makes or executes any engraving, photograph, print,  
or impression in the likeness of any obligation or  
other security [of the United States] or any part  
thereof ... (18 USC § 474 ¶ 6)

The United States Congress has recognized the fact that there may be legitimate academic or educational purposes for reproducing security documents, and has passed laws to that effect. 18 USC § 504 relaxed the restrictions on the reproduction of currency and security documents in 1968 to allow

... the printing, publishing or importation ... of illustrations  
... of any ... obligation or other security of the United States  
... for philatelic, numismatic, educational, historical or  
newsworthy purposes in articles, books, journals, newspapers,  
or albums ... (18 USC § 504)

In 1984, after reviewing the Constitutionality of the reproduction of currency as freedom of speech, the US Supreme Court made a ruling in the case *Regan vs. Time*, the text of which is included for reference. In the case, *Sports Illustrated* printed on its cover a stylized photograph of \$100 bills going through a basketball hoop, in order to illustrate the problem of bribery in collegiate basketball. The Secret Service informed the Time management that they would have to seize the plates and negatives used in the production of the cover, as well as the names and addresses of all the printers and staff associated with the project. At stake in the case was the issue of free speech; was the Secret Service raid a violation of Time's First Amendment rights, or an attempt to protect US currency? The Court ruled that restriction of the reproduction of currency and securities for legitimate publication purposes is unconstitutional. However, the Court also established guidelines that must be followed to prevent the "substantive evil" of overturning the legitimacy of US currency. The reproduction must be in black and white and either enlarged to one and one-half or reduced to three quarters size, and the negatives and plates used must be destroyed following their use (18 USC § 504).

In the intervening ten years since *Regan*, there has been an explosion of new printing and prepress technologies. A desktop computer and a good quality color printer can be had for under \$10,000, and there are no negatives and plates to be destroyed. Evidence can be disposed of simply by trashing a file. Worse yet, once a counterfeit document is created electronically, it can be saved on disk, copied and distributed infinitely, in theory. A counterfeiter could create a document electronically in Denver, for example, and send the file via modem to an overseas location, where documents could be produced and distributed worldwide. A less sophisticated version of such an operation is already being done by the drug



cartels of Colombia. Using bleach and an ultrasound technique, the Colombians are able to remove the ink from real \$1.00 bills and reprint them as \$100s. The bills often are circulated during drug deals, and most wind up back in the United States (Sommer 1993). The implications of such a system being implemented on a larger scale by a counterfeiting operation are staggering. Any security features added during the printing process – i.e. color shifting inks, microprinting – are stripped away.

As yet no legislative or law enforcement body has addressed the issue of electronic distribution of these documents, because there has been no test case. Though it is illegal to create counterfeit currency, passports, etc., no one has fully explored the ramifications of someone creating a file electronically and distributing it along the “information superhighway” for anyone to pick up and print out.

## Chapter 9

### Conclusions

The issue of electronic forgery and counterfeiting is one that will have to be addressed more seriously in the next few years. At present, the cost of much of the hardware and software required to produce passable counterfeits electronically is beyond what the "casual counterfeiter" is able to acquire. Although the problem of the casual counterfeiter will still be prevalent, a more worrisome threat will be that of large criminal or terrorist organizations - or even a hostile government - obtaining high-tech, high end electronic publishing equipment and using it to produce passable currency, passports, and other security documents. The technology exists to produce counterfeit documents faster and more accurately than ever before. These organizations have more resources to use, both monetary and human, and are capable of obtaining - either legally or illegally - the means to do so. A concerted effort by any well-organized criminal or terrorist group represents a serious threat to the economic and physical security of any nation.

The best solution appears not to be a single security device, but a number of devices embedded within a document so that even if one is defeated or forged successfully, the counterfeiter will still have to deal with two, three, or even a dozen others. The problem then becomes one of cost to the agency printing the document. Currently it costs the United States roughly 4.8¢ to print each bill (Fix 1994). How much that cost increases depends on how many of the new security features the government is prepared to adopt.

The main issue in a study of this type is passability - is the counterfeit document close enough to the original to pass a cursory examination? The higher the value on the document, the more likely it is to be subjected to a close inspection. Using image manipulation software such as Photoshop or Photostyler, it is entirely possible to produce a counterfeit security document that will pass a non-rigorous inspection. How authentic it looks depends upon the technical skill of the counterfeiter.

The best weapon against desktop counterfeiting and forgery is vigilance - knowing what security features to look for, and how to tell when they have been illegally reproduced.

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## **Appendix A**

## Appendix A

### *Regan vs. Time*

The following US Supreme Court opinion is taken from *Miscreant Purveyors of Scandal*, edited by Dr. Hugh Fox of the Rochester Institute of Technology. The case revolves around how the government can regulate the use of currency in order to prevent the “substantive evil” of counterfeiting, and how this conflicts with the rights of printers and publishers to free speech.

DONALD T. REGAN, *Secretary of the Treasury, et al*,  
*Appellant*

v

TIME, INC.

468 US 641

Decided July 3, 1984

*Justice White announced the judgment of the Court and delivered the opinion of the Court with respect to Part IIA, and an opinion with respect to Parts II-B, II-C, and II-D, in which The Chief Justice, Justice Rehnquist, and Justice O'Connor join.*

The Constitution expressly empowers Congress to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States.” US Const, Art I, § 8, cl 6. Pursuant to that authority, Congress enacted two statutes that together restrict the use of photographic reproductions of currency. 18 USC § 474 ¶ 6, and 18 USC § 504. The Federal District Court for



the Southern District of New York held that those two statutes violate the First Amendment. The Government asks us to overturn that judgment.

## I

Title 18 USC § 474 was enacted during the Civil War to combat the surge in counterfeiting caused by the great increase in Government obligations issued to fund the war and the unsettled economic conditions of the time. See *United States v Raynor*, 302 US 540, 544-546 (1938). The sixth paragraph of that section provides criminal liability for anyone who “prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any obligation or other security [of the United States] or any part thereof ...” 18 USC § 474 ¶ 6.

This complete ban on the use of photographic reproductions of currency remained without statutory exception for almost a century. However, during that time, the Treasury Department developed a practice of granting special permission to those who wished to use certain illustrations of paper money for legitimate purposes. In 1958, Congress acted to codify that practice by amending 18 USC § 504 so as to permit the “printing, publishing, or importation...of illustrations of ... any ... obligation or other security of the United States ... for philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers, or albums...” 18 USC § 504(1). In order to “prevent any possibility of the illustrations being used as an instrument of fraud,” 5 Rep No. 2446, 85th Cong, 1st Sess 5 (1958); H Rep No. 1709, 85th Cong, 1st Sess 3 (1958), and in an effort to avoid creating conditions which would “facilitate counterfeiting,” 5 Rep No. 2445, *supra*, at

5-6; H Rep No. 1709, *supra*, at 3, Congress also adopted three restrictions that the Treasury Department normally imposed on those who were granted special permission to create and use such photographs. First, the illustrations had to be in black-and-white. Second, they had to be undersized or oversized, i.e., less than three-fourths or more than one and one-half the size of the original. And third, the negative and plates used in making the illustrations had to be destroyed after their final authorized use. Therefore, under the present statutory scheme, a person may make photographic reproductions of currency without risking criminal liability if the reproductions meet the purpose (numismatic, philatelic, educational, historical, or newsworthy), publication (articles, books, journals, newspapers, or albums), color (black-and-white), and size (less than three-fourths or more than one and one-half of the size of the original) requirements of § 504, and if the negatives and plates are destroyed immediately after use.

Over the course of the past two decades, Time, Inc., the publisher of several popular magazines, has been advised by Secret Service agents that particular photographic reproductions of currency appearing in its magazines violated the provisions of §§ 474 and 504. Despite the warnings, Time continued to use such reproductions. When the front cover of the February 16, 1981, issue of Sports Illustrated carried a photographic color reproduction of \$100 bills pouring into a basketball hoop, a Secret Service agent informed Time's legal department that the illustration violated federal law and that it would be necessary for the Service to seize all plates and materials used in connection with the production of the cover. The agent also asked for the names and addresses of all the printers who prepared the cover and requested an interview with a member of Time's management. Ten days later, Time

initiated the present action against the Secretary of the Treasury, the Director of the Secret Service, and others, seeking a declaratory judgment that §§ 474 ¶ 6 and 504 were unconstitutional on their face and as applied to Time, as well as an injunction preventing the defendants from enforcing or threatening to enforce the statutes.

On cross-motions for summary judgment, the District Court ruled in favor of Time. 539 F Supp 1371 (SDNY 1983). The court first determined that Time's use of the illustrations was speech protected by the First Amendment. It then held that § 474 could not by itself pass constitutional muster because although it was enacted to protect the government's compelling interest in preventing counterfeiting, it was overbroad.

The court concluded that the exceptions permitted by § 504 did not save the blanket prohibition because that section presented constitutional problems of its own. Focusing on the requirements that the illustration appear in an article, book, journal, newspaper, or album and that it be used for philatelic, numismatic, educational, historical, or newsworthy purposes, the court held that § 504 could not be sustained as a valid time, place, and manner regulation because it required the Government to make distinctions based on content or subject matter. The court also determined that the purpose and publication restrictions were unconstitutionally vague, observing that "[the determination of what is 'philatelic, numismatic, educational, historical, or newsworthy' is rife with assumption and open to varying interpretation" and that "the definition of a journal, newspaper or album is anyone's game to play." 539 F Supp, at 1390. The court thus concluded that both §§ 474 ¶ 6 and 504 were unconstitutional.

The Government sought review of the District Court's decision by invoking this Court's appellate jurisdiction under 28 USC § 1252. We noted probable jurisdiction in order to determine whether the two statutes could survive constitutional scrutiny.

## II

The District Court correctly observed that “[because of the interrelationship of §§ 474 and 504, the ultimate constitutional analysis must be directed to the impact of these sections in tandem.” 539 F Supp, at 1385. The exceptions outlined in § 504 apply “[n]otwithstanding any other provision of this chapter,” including § 474. The criminal liability imposed by § 474 therefore applies only when a photographic reproduction fails to meet the requirements imposed by § 504. Thus, if the restrictions imposed by § 504 sufficiently accommodate Time's First Amendment interests, both statutes must be upheld. We accordingly begin our inquiry by focusing on the restrictions imposed by § 504.

## A

The Government asserts that the restrictions imposed by § 504 are valid as reasonable time, place, and manner regulations. In order to be constitutional, a time, place, and manner regulation must meet three requirements. First, it “may not be based upon either the content or subject matter of speech.” *Heffron v International Society for Krishna Consciousness, Inc.*, 452 US 640, 648 (1981) (quoting *Consolidated Edison Co. v Public Service Comm'n*, 447 US

530 536 (1980)). Second, it must “serve a significant governmental interest.” *Id.*, at 649 (quoting *Virginia Pharmacy Board v Virginia Citizens Consumer Council*, 425 US 748, 771 (1976)). And third, it must “leave open ample alternative channels for communication of the information.” *Id.*, at 648 (quoting *Virginia Pharmacy Board*, *supra*, at 771). The District Court concluded that the purpose of § 504 could not be sustained as a valid time, place, and manner regulation because it discriminates on the basis of content. We agree.

A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. Under the statute, one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not. The permissibility of the photograph is therefore often “dependent solely on the nature of the message being conveyed.” *Carey v Brown*, 447 US 455, 461 (1980). Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment. *Id.*, at 463; *Police Department of Chicago v Mosley*, 408 US 92, 95-96 (1972). The purpose requirement of § 504 is therefore constitutionally infirm.

The District Court also concluded on vagueness and other grounds that limiting the exemption from the § 474 ban to likenesses of currency contained in “publications” was itself invalid. We do not address that issue, however, because there is no evidence or suggestion that *Time*, a publisher of magazines, has ever, or will ever, have any difficulty in meeting that

requirement. The validity of the publication requirement, standing alone, is therefore of only academic interest to Time. This Court, as a matter of both constitutional limitation and prudential restraint, does not sit to resolve issues that are of only passing concern to the parties. Time nevertheless contends that the publication requirement renders the statute overbroad and subject to challenge by a publisher such as Time. [Citations omitted] The essence of Time's argument seems to be that even if publishers may constitutionally be required to conform to the other requirements of § 504, that section is overbroad because it unconstitutionally precludes non-publishers from making reproductions of currency even though they meet the other requirements of the statute. However, such an overbreadth challenge can be raised on behalf of others only when the statute is substantially overbroad, i.e., when the statute is unconstitutional in a substantial portion of the cases to which it applies. [Citations omitted] How often the publication requirement will be used to prevent a person from utilizing an otherwise legitimate photograph is not clear from the record before us. In describing the non-counterfeiting uses to which photographic reproductions of currency could be put, the House and Senate Committees referred only to situations in which publications were involved. In light of the paucity of evidence to the contrary, we may assume that the legitimate reach of § 504 "dwarfs its arguably impermissible applications" to non-publishers. *New York v Ferber*, supra, at 773. Therefore, invocation of the overbreadth doctrine is unavailing to Time.

C

The District Court concluded that because the purpose and publication requirements were unconstitutional, the entire regulatory scheme outlined in § 504 was invalid. This was error. First, as noted in Section B, the validity of the publication requirement is not an issue that can properly be addressed in this case. More importantly, even if both requirements were unconstitutional, it does not automatically follow that the entire statute must fail.

In exercising its power to review the constitutionality of a legislative act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary. As this Court has observed, "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *El Paso & Northeastern R. Co. v Gutierrez*, 215 US 87, 96 (1909). Thus, this Court has upheld the constitutionality of some provisions of a statute even though other provisions of the same statute were unconstitutional. [Citations omitted] For the same reasons, we have often refused to resolve the constitutionality of a particular provision of a statute when the constitutionality of a separate, controlling provision has been upheld. [Citations omitted] Before invalidating the entire statute, we should therefore determine whether the remaining provisions of §504 can survive in the absence of the purpose requirement.

Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability. "Unless it is evident that the

legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.” [Citations omitted] Utilizing this standard, we are quite sure that the policies Congress sought to advance by enacting § 504 can be effectuated even though the purpose requirement is unenforceable.

One of the main purposes of the 1958 version of § 504 was to relieve the Treasury Department of the burden of processing numerous requests for special permission to use photographic reproductions of currency. The legislation was designed to “obviate the necessity of obtaining special permission from the Secretary of the Treasury in each case where the use of ... illustrations [of currency] was desired.” 5 Rep No. 2446, *supra*, at 6; H Rep No. 1709, *supra*, at 4. At the same time, Congress was aware that in granting requests in the past, the Secretary had imposed size and color limitations in order “[t]o prevent any possibility of the illustrations being used as an instrument of fraud.” S Rep No. 2446, *supra*, at 5; H Rep No. 1709, *supra*, at 3. Congress determined that the easiest way to ease the administrative burden without undermining the Government’s efforts to prevent counterfeiting was to codify the then-existing practice, relying heavily on the Treasury Department’s opinion that “the printing in publications of black-and-white illustrations of paper money ... restricted in size will not facilitate counterfeiting.” 5 Rep No. 2446, *supra*, at 5-6; H Rep No. 1709, *supra*, at 3. This congressional desire to ease the administrative burden without hindering the Government’s efforts to enforce the counterfeiting laws can be achieved even if the purpose requirement is eliminated from the statute. There is no indication that Congress believed that the purpose requirement either



significantly eased the Treasury Department's burden or was necessary to prevent the exception from being used as a means of circumventing the counterfeiting laws. Thus, if the size and color limitations are constitutional, Congress' intent can in large measure be fulfilled without the purpose requirement. We therefore examine the size and color restrictions in light of the First Amendment interests asserted by Time.

## D

In considering the validity of the color and size limitations, we once again begin with the Government's contention that the requirements are sustainable as reasonable time, place, and manner regulations. Unlike the purpose requirement, the size and color limitations do not discriminate on the basis of content. Compliance with the color and size requirements does not prevent Time from expressing any view on any subject or from using illustrations of currency in expressing those views. More importantly, the Government does not need to evaluate the nature of the message being imparted in order to enforce the color and size limitations. Those limitations restrict only the manner in which the illustrations can be presented. They are thus similar to the decibel level restrictions upheld by this Court in *Kovacs v Cooper*, 336 US 77 (1949), and the size and height limitations on outdoor signs upheld by other courts. [Citations omitted] Therefore, the size and color limitations pass the first of the three requirements of a valid time, place, and manner regulation.

The size and color limitations also meet the second requirement in that they effectively serve the Government's concededly compelling interest in

preventing counterfeiting. Time contends that although the color restriction serves the Government's interest in preventing counterfeiting, it is nonetheless invalid because it is not narrow enough. Time asserts that the color restriction applies to an illustration of currency regardless of its capacity to deceive and is thus broader than is necessary to achieve the Government's interest in preventing counterfeiting. However, Time places too narrow a construction on the Government's interest and too heavy a burden on those enacting time, place, and manner regulations. The Government's interest in preventing the color photographic reproduction of currency is not limited to its desire to prevent would-be counterfeiters from utilizing the illustration itself. The requirement that the illustration be in black-and-white is also designed to make it harder for counterfeiters to gain access to negatives that could easily be altered and used for counterfeiting purposes. Only one negative and plate is required for black-and-white printing. On the other hand, the color-printing process requires multiple negatives and plates. This increases a counterfeiter's access to the negatives and plates and enables him to more easily use them for counterfeiting purposes under the guise of a legitimate project. In opposing a recent bill designed to eliminate the color restriction, a Treasury Department official noted these concerns, stating that "[t]he size restriction alone does not address the problem of widespread possession of color separation negatives, nor does it impact upon the availability of a ready-made alibi for the possessors." Statement of the Honorable Robert E. Powis, Deputy Assistant Secretary of the Treasury, Before the Subcommittee on Criminal Justice House Judiciary Committee on H R 4275. It is therefore sufficiently evident that the color limitation serves the Government's interest in a substantial way. That the limitations may apply to some photographs that are themselves of no use to counterfeiters does not

invalidate the legislation. The less-restrictive-alternative analysis invoked by Time has never been a part of the inquiry into the validity of a time, place, and manner regulation. It is enough that the color restriction substantially serves the Government's legitimate ends.

The propriety of the size limitation is even clearer. The size limitation is a reasonable and sufficiently precise way of ensuring that the illustrations themselves do not have the capacity to deceive the unwary and inattentive. Indeed, Time does not advance any serious challenge to the legitimacy of that requirement.

The color and size limitations are therefore reasonable manner regulations that can constitutionally be imposed on those wishing to publish photographic reproductions of currency. Because the provisions of § 474 are of real concern only when the limitations of § 504 are not complied with, § 474 is also constitutional.

### III

The District Court correctly determined that the purpose requirement of § 504 is unconstitutional. However, it erred in failing to consider the validity of the remaining portions of the statute that applied to Time. Because the color and size limitations are valid, neither § 474 nor § 504 is unconstitutional on its face or as applied to Time. The judgment of the District Court is accordingly affirmed with respect to the purpose requirement and reversed with respect to the color and size limitations.

It is so ordered.

*Justice Brennan, with whom Justice Marshall joins, concurring in part and dissenting in part.*

Title 18 USC § 474 ¶ 6 makes it a federal crime to use pictures of money for any purpose whatsoever, even in the absence of an unlawful intent, and without regard to whether such pictures, or the materials used to make them, might be employed fraudulently. Recognizing that this flat ban sweeps within it a substantial amount of legitimate expression posing virtually no risk of counterfeiting, Congress enacted 18 USC § 504, which exempts from the ban illustrations of the currency “for philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers, or albums,” provided such illustrations meet certain restrictions as to form and preparation.

In my view, these two statutes as currently written work together to effect a significant abridgment of expression. And, given the extensive and detailed criminal regulation of counterfeiting found in other parts of Title 18, the two provisions only marginally serve the government’s concededly highly important interest in preserving the integrity of the currency. The Court today does not expressly reject either of these conclusions. Indeed, eight Justices recognize that Congress’ obvious and exclusive intent—to permit only those illustrations of currency with “philatelic, numismatic, educational, historical or newsworthy purposes” and to ban all others—simply cannot constitutionally be achieved through the legislatively chosen means. Ante. Nevertheless, Justice White, joined in the judgment on this point by Justice Stevens, concludes that “neither § 474 nor § 504 is unconstitutional on its face or as applied to Time.”

The key to this paradoxical result lies in the fact that somewhere between the beginning and the end of his opinion, Justice White stops reviewing the statutes enacted by Congress and begins assessing a statutory scheme of his own creation. After identifying separate “purposes” and “publications” conditions for obtaining the § 504 exemption and, correctly in my view, invalidating the former, Justice White proceeds as though the two requirements were written in the disjunctive. He assumes that Congress would have wanted to exempt illustrations satisfying *either* condition and therefore feels authorized to leave one in force while invalidating the other. Accordingly, Justice White proposes simply to excise certain offending words from the integrated clause in which they appear and leaves the rest of the statutory language in place confident that the revised version of the statute “sufficiently accommodates Time’s First Amendment interests,” ante, while effectuating “the policies Congress sought to advance.”

I certainly agree with the principle that we should construe statutes to avoid constitutional questions, so long as our interpretation, remains consistent with Congress’s objectives. But, in my view, Justice White’s limiting construction of the statutory scheme at issue here neither remains faithful to congressional intent nor rids the legislation of constitutional difficulties. The statutory scheme left in force after Justice White’s “remarkable feat of judicial surgery,” *Welsh v United States*, 398 US 333, 351(1970) (Harlan, J, concurring in result), would ban illustrations of currency by all “non-publishers,” even for the kinds of purposes Congress plainly intended to allow, but permit identical illustrations by all “publishers,” without regard to the purposes of their illustrations and even if the nature of

their media poses a relatively greater risk of counterfeiting. Such a reconstructed scheme bears no relationship to the language, history, or purpose of the statutes as enacted. And, despite the removal of the “purposes” requirement, the revised statutes remain unconstitutional on their face.

Because the Court decides that §§ 474 and 504 are constitutional as applied to Time, it may be useful to review in somewhat more detail precisely how these provisions have been applied to appellee. For many years, Time’s various magazines have used pictures of US currency to illustrate articles concerning political, economic, and sports events. As appellee explains, these pictures have depicted bills “significantly enlarged or reduced in size, discolored or otherwise altered in appearance, shown only in part, and/or substantially obscured by printed legends or overlaid objects.” Brief for Appellee 3. In addition, each picture “appeared on only one side of a page, and that page was of the glossy paper used in the production of [appellee’s] magazines.” Ibid. See 539 F Supp 1371, 1377-1379 (SDNY 1982). Beginning as early as 1965, Time was warned by agents of the Secret Service that such illustrations violated the ban on currency reproductions imposed by § 474 and were not exempt under §504. App 29. In the ensuing years, Secret Service agents offered Time several different interpretations of the statutory requirements. At various points, Time was informed (a) that it could print only black and white likenesses of currency of a specified size and only for “numismatic, educational, historical or newsworthy” purposes, App 27: (b) that it could never print any photograph of currency in any color or size, because § 504 exempts only “illustrations,” *ibid.*; and (c) that it could only print likenesses accompanied by “numismatic, educational, historical or newsworthy” information about the particular Federal Reserve Note

illustrated. *id.*, at 2728, and could not use likenesses for “decorative or eye-catching purposes,” *id.*, at 33.

Relying on these varying constructions of the statutes, Secret Service agents informed *Time* that it violated federal law when it used partial and distorted likenesses of currency to illustrate articles concerning, among other things, inflation, the effect of economics on an election campaign, a conference on international monetary policy, corporate bribery, and the financial difficulties faced by a “cash-rich” corporation. *Id.*, at 29-34. On several occasions, advance warnings and “slap[s] on the wrist,” *id.*, at 34, from the Secret Service led *Time*’s editors to withdraw covers that had been prepared and to substitute illustrations which, in their judgment, were “not nearly as effective in communicating the thought intended to be conveyed as the illustration banned by the Secret Service.” *Id.*, at 29, 30.

In May 1981, a Secret Service agent informed *Time*’s legal department that the cover of an issue of *Sports Illustrated* that had appeared three months earlier violated the counterfeiting statute. The supposedly offending cover, illustrating an article concerning a bribery scandal in amateur basketball, included color reproductions of portions of \$100 bills, one-third of actual size, pouring into a basketball hoop. The agent told *Time* that the Secret Service would seize all materials used in preparation of the cover, asked for the names and addresses of all individuals or companies involved in its production, and requested an interview with a member of *Time*’s management. Ten days later, *Time* brought this action seeking declaratory and injunctive relief to prevent the government’s enforcement or threat of enforcement of §§ 474 and 504 against *Time*.

## II

The linch-pin of Justice White's opinion is his view that the words in § 504 limiting the exemption to illustrations of currency "for philatelic, numismatic, educational, historical, or newsworthy purposes," can be excised from the phrase in which they appear while leaving in force the language that remains, notably the requirement that exempted illustrations appear in certain "publications," that is, "in articles, books, journals, newspapers, or albums." Justice White acknowledges that, after invalidating the 'purposes' requirement, he should decide whether what is left consists of "'unobjectionable provisions separable from those found to be unconstitutional.'" [Citations omitted]. But, although he explains why he finds the "publications" requirement "unobjectionable," at least in the context of this case, ante, he never explains why the language setting out that condition is "separable" from the rest of the sentence in which it appears.

In my view, the language of the statute Justice White would leave in force is neither "separable" nor "unobjectionable". Despite his recognition that severability depends "largely" on congressional intent, his deletion of a few words from an indivisible phrase in § 504 would work a dramatic change in the scope of the scheme contemplated by Congress. As a result of this exercise in legislative draftsmanship, all members of the ill-defined class of "publishers" meeting the other requirements of § 504 would be exempt from the § 474 ban, regardless of the purposes their illustrations may serve or the risk their illustrations may pose of endangering the currency. Conversely, all "non-publishers" would be subject to the § 474 ban, even when pursuing the



same legitimate purposes through illustrations that pose a similar, or even smaller, threat of counterfeiting. I do not believe this limiting construction of the statutory scheme can be supported by (A) the language and structure of § 504 or (B) its legislative history and purposes. And, as I shall show in Part III, the substantial abridgement of free expression imposed by these statutes, even as Justice White would revise them, renders the remaining language far from constitutionally “unobjectionable.”

## A

As relevant here, the version of § 504 passed by Congress exempts from the criminal prohibition against using pictures of the currency

“(1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of-

“(2) any.... obligation or other security of the United States, *for philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers, or albums* (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums).” 18 USC § 504 (1982) (emphasis added).

The plain language of § 504 extends the availability of the exemption from the § 474 ban to those illustrations serving the specified enumerated purposes and to no others. Although the statute also requires such illustrations to appear in certain media, the “purposes” and “publications” restrictions are not written in the disjunctive. They are instead linked by the word “in,” indicating that neither is a sufficient condition for claiming the protection of the statute; the only illustrations that are permitted are those that both serve the specified purposes and appear “in articles, books, journals, newspapers, or albums.” By its terms, therefore, the list of media is a qualification that narrows the scope of the exemption, rather than an independent and severable basis for obtaining permission to use illustrations of the currency.

Justice White initially recognizes that the “purposes” and “publications” restrictions act together to limit the scope of the exemption. Yet, in concluding that Congress would exempt even those “publications” that do not serve the designated “purposes,” Justice White proceeds as though the two requirements were written in the disjunctive. Only by reading the statute as permitting illustrations that meet *either* the “purpose” *or* the “publication” requirement can one conclude that Congress would have wanted the exemption to be available to parties satisfying one condition but not the other.

As far as I am aware, this is the first time that Members of the Court have sought to sever selected words from a single integrated statutory phrase and to transform a modifying clause into a provision that can operate independently. To be sure, Congress could easily have placed the “purpose”

and “publication” requirements in separate subsections and connected them with the word “or”; in that event, one might plausibly conclude that one can operate as a basis for exemption without the other. The fact is, however, that Congress did not enact the statute in that form and there is no indication that it intended the statute to operate as though it had. By using the qualifying connective “in”-rather than *or in*—Congress must have intended an exemption only for those illustrations “in articles, books, journals, newspapers, or albums” that serve the listed purposes-and not for any picture that could be said to appear in the designated media. In short, the very language with which Congress joined the “purposes” and “publications” requirements refutes Justice White’s conclusion that they are severable.

## B

Notwithstanding the statute’s clearly expressed goal of exempting *only* illustrations with “philatelic, numismatic, educational, historical, or newsworthy purposes,” Justice White expresses his confidence that “the policies Congress sought to advance by enacting § 504 can be effectuated” even though that standard is unenforceable. He never explains, however, how congressional policies might be advanced with the “purposes” language deleted and the “publications” requirement left in force. Indeed, he never indicates just what function he believes the list of publications in the statute was intended to serve. We cannot, however, properly conclude that the “publications” requirement can be lift “standing alone” without considering how that requirement relates to the overall objectives of the statutory scheme. A review of the history and purposes of the statutory scheme provides no support for the conclusion that Congress would want to extend

special protection to all illustrations in “publications” and to ban the pictures of “nonpublishers,” without regard to whether either group’s illustrations serve “philatelic, numismatic, educational, historical, or newsworthy purposes.”

(1)

Consistent with the plain language of § 504, the statute’s legislative history confirms that it was originally adopted, and later amended, in order to exempt from the otherwise comprehensive ban on likenesses of the currency only those illustrations that serve the specific purposes Congress deemed worthy of special protection. At the outset, it is crucial to recall the breadth of Congress’ total ban on all illustrations of the currency, a prohibition that was hurriedly adopted as part of comprehensive emergency legislation designed to fund the Civil War, and that has been reenacted with little explanation and only minor changes in wording in every subsequent revision and codification of the federal criminal code. See Brief for Appellee 6-8.

[Justice Brennan then proceeded to review the history of the statute after its initial enactment and concluded .... “that the central objective of § 504-its very essence-was to exempt *only* illustrations ‘for philatelic, numismatic, educational, historical, or newsworthy purposes.’ Having concluded that this objective cannot constitutionally be achieved through the legislatively chosen means, Justice White therefore errs in simply deleting the crucial statutory language and using the words that remain as the raw materials for a new statute of his own making.]

In light of the history and obvious objective of the statute, an independent “publications” requirement standing alone makes little sense. As the government now seems to acknowledge, the most plausible explanation for the requirement that illustrations serving the listed purposes appear “in articles, books, journals, newspapers, or albums” is that Congress thereby intended to provide further elaboration as to the general sorts of activities it wished to allow while seeking to ensure that the exemption not be used to justify the creation of likenesses so physically similar to genuine currency that they could be used fraudulently. The government therefore suggests that the “purpose” and “forum” language work *together* to establish a single standard for exemption that is “descriptive and illustrative, rather than prescriptive and mandatory.” Brief for Appellants 28. It thus reads the entire phrase that Justice White would split in two as limiting the exemption’s availability to legitimate “publications,” broadly understood, as distinguished from potentially deceptive “facsimiles.”

This interpretation ascribes far more rationality to Congress than would any suggestion that, in order to obtain the benefit of the exemption, an illustration must literally “appear in one of the enumerated publications.” It is difficult to imagine why Congress would have considered only pictures “in articles, books, journals, newspapers, or albums”—as distinct from those on, say, leaflets or posters—sufficiently important or legitimate to warrant a special exemption from the § 474 ban. Nor could the apparent arbitrariness of a special exemption for just the listed “publications” be justified by reference to Congress’ desire to minimize the risk of counterfeiting. Although a limitation to the expressly listed media might exclude “facsimiles,” there are

numerous other media for expression not found in the statutory list that do not come close to resembling slips of paper in the shape and consistency of Federal Reserve Notes. It could hardly be contended, for example, that depictions of the currency on billboards, placards, or barnyard doors pose a greater threat of counterfeiting than identical illustrations in “articles, books, journals, newspapers, or albums.” And, finally, although a restrictive reading of the “publications” requirement might arguably serve Congress’ undoubted wish “to relieve the Treasury Department of the burden of processing numerous requests for special permission to use photographic reproductions of currency,” mere “administrative convenience,” independent of any substantive objective, was plainly not the primary legislative goal. To the contrary, the legislative history of § 504 confirms that Congress substantive objective in enacting a specific exemption from the § 474 ban was to grant special permission for illustrations serving specified purposes, and not to permit illustrations in certain publications simply because such an exemption would be easier to administer.

Accordingly, I agree with the government that the list of publications cannot sensibly reflect a congressional intention to confer special status on the particular media listed. Instead, those words are best read as operating in necessary conjunction with the “purposes” requirement to provide enforcement authorities with general guidance as to the particular kinds of “legitimate” activities Congress meant to protect while permitting those authorities to exclude uses in media whose form or appearance present too serious a risk of fraud. On this construction, however, the two requirements are so completely intertwined as to be plainly inseverable; they constitute a single statutory provision which operates as an integrated whole. They

therefore “must stand or fall as a unit.” Cf. *Planned Parenthood of Missouri v Danforth*, 428 US 52, 83 (1976).

### III

A court’s obligation to leave separable parts of a statute in force is consistent with its general duty to give statutes constructions that avoid constitutional difficulties. See *New York v Ferber*, 458 US 747, 769, n 24 (1982). Accordingly, in order to uphold a portion of an unconstitutional statute, a court must determine not only whether the legislature would have wanted that part to remain in effect, but also whether “what is left” is itself constitutional. See *Buckley v Valeo*, 424 US 1, 108-109 (1976). For the reasons I have set out in Part II, I cannot agree that Congress would have retained § 504 as presently written without the ‘purposes’ requirement. Even if I am wrong, however, and Justice White’s limiting construction of the statutory scheme is faithful to congressional intent, I would still reject that interpretation. In my view, the statutory scheme, even without the “purposes” requirement, remains unconstitutional on its face.

Because the First Amendment interests at stake in this case are denigrated by the government, brief for Appellants 20, and all but ignored by Justice White, it becomes necessary to emphasize their nature and importance. The adage that “one picture is worth a thousand words” reflects the common sense understanding that illustrations are an extremely important form of expression for which there is no genuine substitute. And, as a cursory examination of the magazine covers at issue in this case vividly demonstrates, the image of money in particular is an especially evocative and

powerful way of communicating ideas about matters of public concern, ranging from economics to politics to sports. See 539 F Supp, at 1383. Contrary to appellant's contention, Brief at 20, a statute that substantially abridges a uniquely valuable form of expression of this kind cannot be defended on the ground that, in the government's judgment, the speaker can express the same ideas in some other way.

Even as Justice White would revise it, the statutory scheme at issue here works just such a substantial abridgement of speech for significant numbers of individuals who might wish to use illustrations of the currency for perfectly legitimate reasons and in ways that pose no serious risk of counterfeiting. Depending on which of two interpretations of the "publications" requirement is adopted, such illustrations are either (A) allowed, if at all, only when licensed by Secret Service agents enforcing an utterly standardless statutory definition of "illustrative" uses or (B) completely prohibited because they do not literally appear "in articles, books, journals, newspapers, or albums." [Citations omitted.]

## A

An independent "publications" requirement has not, until today, been understood as the critical element in the statutory scheme even by the government. We therefore have little basis on which to determine precisely what kinds of illustrations it permits and what kinds it prohibits. Yet Justice White refuses to consider the scope of the statutory language he would sustain because of his confidence that those words will in no event pose problems for appellee. But, given appellee's overbreadth challenge, we cannot



avoid engaging in an assessment of the statute's reach and, therefore, of its possible vagueness. As the Court reaffirmed just last Term, "we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines." [Citations omitted.] It is difficult to understand how Justice White, having rejected the government's interpretation of the statute, can so easily "assume that the legitimate reach of § 504 'dwarfs its arguably impermissible applications' to "nonpublishers" without providing some explanation as to just what a "nonpublisher" may be. In order to evaluate Time's claim that "the statute is unconstitutional in a substantial portion of the cases to which it applies," we must consider how it applies to other cases even if its application to appellee may be clear.

As I have noted, the government's interpretation of the statute licenses the Treasury Department to determine, on a necessarily ad hoc basis, whether a given picture appears in a medium of which the statutory list is "illustrative" or whether, instead, its medium looks too much like the kind of "facsimiles" prohibited by other parts of the statutory scheme. This construction might enable many people using pictures of the currency for legitimate purposes to avoid criminal liability, but it creates precisely the sorts of constitutional infirmities that have led the Court to invalidate the "purposes" requirement. As read by the government, the "publications" requirement vests in Secret Service agents, monitoring the enormous variety of uses to which pictures of the currency can be put, virtually unconstrained authority to decide whether a given illustration imposes criminal liability on its author or not. [Citation omitted]. Such unguided discretion inevitably poses a serious risk of government discrimination on the basis of content or subject matter. Cf. *Lovell v Griffin*, 303 US 444, 451-452 (1938). See ante,

("[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"). See generally *Hynes v Mayor of Oradell*, 425 US 610 (1976). And because § 474 ¶ 6, unlike the other counterfeiting provisions in Title 18, imposes criminal liability without any showing of unlawful intent, construing § 504 to exempt only those uses deemed legitimate by enforcement authorities would render the statutory scheme "little more than 'a trap for those who act in good faith.'" *Colautti v Franklin*, 439 US 379, 395 (1979) (quoting *United States v Ragen*, 314 US 513, 524 (1942)).

Accordingly, if, as the government suggests, the "publications" requirement is only "descriptive and illustrative" of the kinds of uses Congress intended to permit and its precise meaning must be left to case-by-case judgments by Secret Service agents, people "whose First Amendment rights are abridged by [§474 ¶ 6 will] have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the [Secret Service]." Cf. *Secretary of State of Maryland v Munson*, *supra*. On that interpretation, the statutory scheme upheld today is unconstitutional on its face "because it [is apparent that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." *Members of Los Angeles City Council v Vincent*, 1406 US 789, (19821) (footnote omitted). See also *Kolendar v Lawson*, *supra*, n 8.

Insofar as his opinion reveals, however, Justice White appears to assume that the list of media is not "illustrative" as the government suggests, but rather strictly limited to "articles, books, journals, newspapers, or albums." Assuming *arguendo* that so construed the list of media is sufficiently definite

to prevent arbitrary enforcement, it presumably excludes illustrations of the currency-without regard to size, color, or capacity to deceive-on such items as placards, billboards, pamphlets, bumper stickers, leaflets, posters, artist's canvasses, and signs. Unlike Justice White, I have little trouble concluding that, by imposing criminal liability on persons making such illustrations without any showing of unlawful intent, the prohibition created by the "publications" requirement renders this penal scheme "'susceptible of sweeping and improper application.'" *Bigelow v Virginia*, 421 US 809, 816 (1975) (quoting *NAACP v Button*, 371 US 415, 433 (1963)). As appellee notes:

"[E]qually banned by the statute are a Polaroid snapshot of a child proudly displaying his grandparent's birthday gift of a \$20 bill; a green, six-foot enlargement of the portrait of George Washington on a \$1 bill, used as theatrical scenery by a high school drama club; a copy of the legend, 'In God We Trust', on the leaflets distributed by those who oppose Federal aid to finance abortions; and a three foot by five-foot placard bearing an artist's rendering of a 'shrinking' dollar bill, borne by a striking worker to epitomize his demand for higher wages in a period of inflation." Brief for Appellee 5-6.

I do not, of course, suggest that each of the people making and displaying these sorts of depictions will be deterred from doing so by potential enforcement of the broad statutory scheme upheld today. I have no doubt,

however, that substantial numbers of them will be, particularly if advised by lawyers aware of today's decision. Cf. *Erznoznik v City of Jacksonville*, 422 US 205, 217 (1975). To take a single example, a poster artist with a reasonably competent attorney would certainly think twice before risking his resources on the kind of political protest attempted by the defendant in *Wagner v Simon*, 412 F Supp 426, *aff'd*, 534 F2d 833 (CA8 1976). See n 20, *supra*. Justice White brushes this prospect aside with the statement that "one arguably unconstitutional *application* of the statute does not prove that it is substantially overbroad, particularly in light of the numerous instances in which the requirement will easily be met." (emphasis added). But this remark misses the entire point of the overbreadth doctrine. Our willingness to entertain overbreadth challenges is based, not on concern with past applications of an unconstitutional statute to completed conduct, but rather on the recognition that "persons whose expression is constitutionally protected may well *refrain* from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v Wilson*, 405 US 518, 521 (1972) (emphasis added).

By imposing criminal liability without fault on those who use pictures of money for any purpose whatsoever unless the pictures appear in "publications," the statutory scheme at issue here plainly amounts to "a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest" of the government. *Schaumburg v Citizens for a Better Environment*, 444 US 620, 636 (1980). The governmental interests putatively served by the scheme-the detection and prevention of counterfeiting-are, of course, substantial. But the many other criminal provisions aimed at counterfeiting, together with the

various exceptions to the §471 ¶ 6 ban, demonstrate that those interests “are only peripherally promoted” by the provisions at issue here and “could be sufficiently served by measures less destructive of First Amendment interests.” *Ibid.*

The strongest evidence that the important government interest in preventing counterfeiting may be served by means less restrictive of free expression than those upheld today can be found in the numerous other provisions of Title 18 designed to serve that end. The government contends that §474 ¶ 6 and 504 add an essential additional weapon to this extensive enforcement arsenal. Although it has not been entirely consistent on the point, see n 12, *supra*, the government currently advances two ways in which these provisions enable “the Secret Service to operate more effectively in tracing and identifying the source of counterfeit bills,” Brief for Appellant 21. First, it contends that the ban on illustrations prevents the creation of “facsimiles” that, however innocent their purpose, could be passed off as genuine pieces of currency. See *id.*, at 334-35. It is, however, difficult to believe that the distorted and discolored pictures of portions of the currency that Time has placed on its covers have a serious capacity to deceive. Moreover, the “publications” requirement, if construed in a way to avoid potentially arbitrary enforcement, works to prohibit illustrations in numerous media—such as billboards, placards, posters, and walls—that are a far cry from “facsimiles” and that, indeed, bear less of a physical resemblance to actual money than pictures in “publications” might.

Second, the government claims that, without §§ 474 ¶ 6 and 504, “counterfeiters would more readily be able to conceal their criminal conduct

by associating with legitimate print shops, thereby availing themselves of an instant alibi for manufacturing and possessing currency negatives.” *Id.*, at 21 (footnote omitted). But this argument is hard to take seriously, especially in light of the construction of the statutory scheme advanced by Justice White. For one thing, the plates and negatives manufactured by appellee for its covers are capable of producing only replicas of the distorted and discolored pictures of portions of currency for which they were made. See 539 F Supp, at 1387; App 76; n 27 *infra*. And producing such plates hardly enhances the capacity or opportunity of those with access to legitimate printing facilities to produce other plates more useful in counterfeiting. Moreover, if the object of the ban is to minimize the counterfeiting possibilities created by the activities of legitimate print shops, that object is, to put it mildly, ill-served by a statute that prohibits only illustrations created by “nonpublishers.” Finally, in an age of easy access to high-quality photo-offset printing, ranging from the office copying machine to the sophisticated equipment of printers for hire, the notion that a would-be counterfeiter would use the plates created for appellee’s magazine covers—instead of copying actual pieces of currency—strains credibility.

The degree to which a statutory ban on a form of expression substantially furthers legitimate state interests may often be assessed by consideration of its exceptions. As originally enacted, and as Justice White would reinterpret it, the statutory scheme at issue here is riddled with arbitrary distinctions between lawful and unlawful activities that undermine the government’s claim that the scheme substantially furthers its legitimate interests. Pictures appearing in the broad, but undefined, class of “nonpublications” are prohibited without regard to their manner of production, size, shape, color,

composition, or capacity to deceive anyone. But pictures manufactured by “publishers,” whose facilities would presumably be more useful to counterfeiters, see Brief for Appellant 21-22, as well as color slides of actual pieces of currency, § 504(2), are permitted. Likenesses appearing on newsprint or quality paper stock may be allowed, but apparently not those made of wood, plastic, or cardboard. A picture of a small portion of currency painted orange and appearing on a protest sign is prohibited, while a “publisher” may manufacture an enlarged negative which can be used to print the front of a dollar bill in its natural black and white.

In sum, if the “publications” requirement has sufficiently definite content to prevent its arbitrary enforcement, the statutory scheme upheld today is fatally overbroad. The extensive and detailed provisions regulating counterfeiting in other parts of Title 18 as well as the numerous eccentric exceptions to the statutes at issue here demonstrate that the flat ban imposed by these penal provisions on a wide variety of expression posing no conceivable danger of counterfeiting is far “greater than is necessary or essential to the protection of the particular governmental interest involved.” *Seattle Times Co. v Rhinehart*, 467 US 20 (1984) (quoting *Procunier v Martinez*, 416 US 396, 413 (1974)). IV

As the government itself acknowledges, the statutory scheme sustained today “regulates the manner in which publishers may depict an item every person sees every day.” Brief at 33, n 24. As enacted by Congress, this regulation took the form of prohibiting any such depictions unless they were “for philatelic, numismatic, educational, historical or newsworthy purposes.” In an admirable effort to sustain this scheme, Justice Stevens “construes” that

language so that it means essentially nothing: Notwithstanding the “purposes” requirement he purports to uphold, any likeness of the currency is permissible unless it is used for counterfeiting. Justice White, in contrast, acknowledging that the “purposes” language cannot be “saved,” offers a new statute that would limit the activities of publishers, whose technical capacity to engage in actual counterfeiting is thereby diminished not one whit, and that would completely ban illustrations by “nonpublishers,” who presumably have no such capacity in the first place. The scheme Congress adopted is plainly unconstitutional; the alternative pieces of legislation proposed by Justice White and Justice Stevens bear little resemblance to the statutes Congress passed.

I do not doubt that a statute can be written that would both satisfy the requirements of the First Amendment and effectively advance the legitimate and important ends Congress sought to achieve in §§474 4 6 and 504. Today’s efforts to draft such a statute have, however, confirmed the wisdom of leaving that task to the legislative branch.

I would affirm the judgment of the District Court.

*Justice Stevens, concurring in the judgment in part, and dissenting in part.*

Time’s challenge to the constitutionality of the prohibition against making any likenesses of currency might proceed on either of two quite different theories. First, even if Time’s ability to communicate is adequately protected by the rather complex exception for publications that contain pictures complying with color and size limitations, the prohibition against



communications that do not come within the exception is so broad-or so poorly defined-that the entire statute is invalid. Second, without considering the potential impact of the statute on third parties, the restrictions are invalid, in whole or in part, as they apply to Time. Given that this statute contains an express exception for expression which may fully accommodate Time's First Amendment rights, I think the Court should begin its analysis by evaluating the impact of the statute on the litigant before the Court before it confronts any question concerning the statute's impact on third parties.

I also think that the Court should decline Time's invitation to plunge right into the constitutional analysis without pausing to determine whether, and to what extent, a fair construction of the statute would protect Time's legitimate interests and also avoid the unnecessary adjudication of constitutional questions. Most of the Treasury Department's criticism of Time's use of pictures of currency-and I believe all of its criticism of black and white reproductions-stemmed from what I regard as an incorrect reading of the word "newsworthy" in § 504. Although I recognize that the Government has not been consistent in its reading of that word, any ambiguity could readily have been eliminated by a declaratory judgment construing the term.

Time, however, did not ask the District Court or this Court for a favorable construction of the statute. Instead, as is the current fashion in First Amendment litigation, it asks this Court to adopt the most confusing and constitutionally questionable interpretation of the statute that it could in order to fortify its constitutional challenge.

Plainly there is no need to rely on the "overbreadth" doctrine to support Time's standing to challenge the constitutionality of this statute. Time is a publisher of widely circulated news magazines. The record makes it perfectly clear that the statute impairs its ability to communicate with the public by using some illustrations that include small, but colorful reproductions of currency. There can be no doubt concerning respondent's standing to challenge the statute's requirement that pictures of money may not use any color except black and white and must be either less than three fourths or more than one and a half times the size of actual bills or coins. Time's own First Amendment rights are clearly implicated.

It is clear to me that Time's problems with this statute are not exacerbated in the slightest by the fact that the exception from its blanket prohibition is limited by a "purpose" requirement and a "publications" requirement or, as Justice Brennan argues, a single requirement that merges both concepts. Under a proper construction of this provision, any picture of money that Time will disseminate would qualify as "newsworthy"-and thus satisfy the purpose requirement-as well as being contained in a "magazine"-and thus satisfy the publications requirement. Thus, to evaluate the constitutionality of the color and size restrictions as they affect Time, it is wholly unnecessary to consider the significance of either the publications or the purpose requirement for parties who are not before the Court. [Citations omitted.] In short, while the statute might not have accommodated adequately the First Amendment rights of all individuals, if it has successfully avoided abridging

Time's freedom of speech or press through the exception, Time has no stake in championing the rights of third parties regarding these issues.

When § 474 was adopted, it probably occurred to no one that the statute limited legitimate communication. The post Civil War Congress that enacted § 474 presumed that anyone printing or photographing likenesses of the currency was up to no good. The use of images of the currency for legitimate, communicative purposes was probably too esoteric to be deemed significant or realistic in the 19th Century, and it was of the utmost concern to assure the integrity and value of the greenback-itself under attack on constitutional grounds as being inherently worthless and not suitable as legal tender, see *The Legal Tender Cases*, 12 Wall 457 (1871) (overruling *Hepburn v Griswold*, 8 Wall 603 (1870)). Section 474, to the extent it prohibits expression at all, does so only inadvertently and incidentally. The object of § 474 is plain and has nothing whatever to do with suppressing dissemination of ideas on the basis of content or anything else. The prohibition plainly is not "aimed at any restraint of freedom of speech...." *Cox v New Hampshire*, 312 US 569, 578 (1944). It dedicates the image Congress selected for our currency to the use for which it is lawfully intended and prohibits all others from making likenesses of that image. Section 474 itself does not turn on the content or subject matter of the message a speaker might wish to convey; it serves a significant governmental interest; and it leaves open alternative channels for communication of the information. It is subject to attack on the grounds that it serves the governmental interest too imprecisely to justify the incidental effect on communication. In short, § 474 is a restriction on the manner of expression, and if it would suffer from any constitutional infirmity, presumably it would be on the ground that it is "overbroad."

This provision stood on the books for nearly a century without modification or challenge, but as the decades passed, and the instruments of mass communication multiplied and became more sophisticated, free expression clashed with § 474. The familiar image of US currency became a powerful symbol, to the point of perhaps becoming somewhat of a modern icon. So embedded is the freedom of speech and of the press in our governmental institutions that with no overt suggestion of a constitutional infirmity in § 474, the Treasury Department adopted the practice, without evident statutory authority, of making exceptions from the broad prohibition in the interest of free expression on a case by case basis.

Section 504 is Congress's attempt to narrow whatever "overbreadth" infects § 474: Congress sought to accommodate the interests in using the symbol of the currency for free expression in the marketplace of ideas. Important as its symbolic value is, however, communication is of course not the primary purpose of the image-its primary purpose is its use in exchange transactions. A core governmental function is implicated in this case, and the compelling nature of the Government's interest is demonstrated by the fact that Article I, § 8, cl 6 of the Constitution expressly empowers Congress "to provide for the Punishment of counterfeiting the Securities and current Coin of the United States." The dispute in this case is not over the strength of the governmental interest, but rather the extent to which it is served by the specific provision in question. In my view, however, a statute which implicates a particularly strong governmental interest need not serve that interest to the same degree to withstand constitutional scrutiny as it would if

the interest were weaker. Similarly, the effectuation of that interest need not be perfect, or nearly so, if the intrusion on expression is minimal.

Congress's attempt to reconcile the competing interests, and to eliminate possibly impermissible applications of § 474, is entitled to great respect. When Congress legislates exceptions to a general prohibition to accommodate First Amendment interests, we should not adopt a grudging interpretation of the exceptions, but should liberally construe them to effectuate their remedial purposes. Congress adopted the exception in the spirit of the First Amendment; courts should construe them in the same fashion. There is a presumption in favor of the constitutionality of an Act of Congress. See, e.g., *Rostker v Goldberg*, 453 US 57, 64 (1981). This presumption should be particularly salient regarding a statutory scheme which on its face goes far in accommodating the interests of free expression at stake in a statutory scheme legitimately directed at a serious substantive evil.

Generally, of course, we construe acts of Congress to avoid constitutional questions. See, e.g., *United States v Clark*, 445 US 23, 27 (1980). This maxim of construction is not merely based on a desire to avoid premature adjudication of constitutional issues. Like others, the maxim also reflects a judicial presumption concerning the intent of the draftsmen of the language in question. In areas where legislation might intrude on constitutional guarantees, we believe that Congress, which also has sworn to protect the Constitution, would intend to err on the side of fundamental constitutional liberties when its legislation implicates those liberties.

In this case, this belief is no mere presumption. Congress recognized, as had the Executive Branch for years, the expressive value of the image of the currency and determined § 474 undermined such expression, sweeping within its prohibition identifiable, legitimate uses of the image. In § 504, Congress sought to excise the surplusage from the broad prohibition of § 474 to ameliorate the overbreadth of that provision. Respondent does not attack § 504 as overbroad-it argues that it is not broad enough. Stated another way, respondent contends that the impermissible applications of § 474, even with the large exception carved out by § 504, dwarf the permissible applications.

Appellee maintains that Congress failed in its attempt to accommodate First Amendment interests. Specifically, it attacks the purposes requirement and essentially contends that it has a First Amendment right to take color photographs of US currency so long as the specific pictures it publishes cannot be passed off as the real thing.

### III

#### *Purposes Requirement*

The Court devotes little attention to the constitutionality of the purposes requirement, brushing aside this attempt by Congress to reconcile the interest in free expression with respect to images of the currency with the interest in protecting the integrity of that image for its primary purpose. In a paragraph, we are simply told that a determination of newsworthiness or educational value of an image of the currency must be based on the content of the message and that the Government will determine if that message is newsworthy in determining the applicability of the exception. Then the Court

makes the sweeping statement that regulations permitting the Government to discriminate on the basis of content are per se violative of the First Amendment.

I do not interpret the provision to give the Government a license to determine the newsworthiness or the value of the substantive message being conveyed. Rather, giving it the liberal construction I think it deserves, the question is merely whether the image of the currency is used for such a purpose, or stated another way, whether the image is being used to convey information or express an idea. That requirement is easily met—whenever the image is used in connection with a news article, it necessarily will comply with this condition unless the editor's use of the image bears no rational relationship to the information or idea he is trying to convey. The key point is that he must be attempting to communicate: he must be using the symbol as expression protected by the First Amendment, and not merely reproducing images of the currency for some non-communicative purpose, e.g. to facilitate counterfeiting.

#### *Color and Size Requirements*

With respect to the cover illustrations contained in the record in this case, it would appear that Time's interest is in reproducing realistic illustrations of the currency, and the more realistic the illustration, the more effective the communication. However, the very heart of the Government's interest grows stronger the more realistic the illustration is. Stated another way, Time does not want to use illustrations of the currency which plainly appear spurious; the government's precise legitimate interest is to permit only those illustrations which do plainly appear spurious. Time notes that one of these

pictures may be worth a thousand words; the government notes one of these pictures or negatives may be worth a thousand dollars.

Time particularly objects to the color requirement-it wants to print pictures of money in its actual color. Time's communicative interest in printing pictures of the currency in color seems weak. We are not told that use of the actual color of the currency expresses an idea itself, aside from communicating information about the color of the currency. But that is not necessary to communicate the substantive ideas Time is attempting to convey, any more than the size of the bill must be communicated by showing its actual size. The use of the bill's actual color adds little if anything to the message, particularly because the currency itself is not especially colorful.

A reproduction which meets the size requirements, to be sure, advances the government interest in preventing deception, but the color requirement advances the interest as well, in a manner that is independent of the size requirement. Imposing both requirements reduces the likelihood of the evil Congress legitimately desired to prevent to a greater extent than imposing just one of the requirements.

To argue, as does Time, that the color requirement is invalid would invalidate the size requirement as well. Time argues that the color requirement is invalid because some of its covers violate the color requirement and yet "none of them has the remotest capacity for deception or could otherwise be used to make a counterfeit." Br for Appellee 43. The same argument could be made if the covers violated the size requirement. The reasons Time points to in arguing that its covers pose no real risk as



instruments for fraud—such factors as the kind of paper used for its covers, and the fact that images of the bills are partially obscured or distorted—would be equally applicable if Time violated both the color and size requirements. The point is that whatever capacity the covers have as instruments of deception is necessarily enhanced if the bill is shown in its actual color, just as it is enhanced if the bill is reproduced in its actual size.

Moreover, Time all but ignores the potential variety of ways in which a negative could be used for illegitimate purposes. The size requirement is meaningless, or always met, with respect to a negative. The point, of course, is that a negative that makes a print meeting the size requirement can also make a print the exact size of a bill. If it is a black and white negative, all that can be produced is a black and white reproduction of the bill; if it is a color negative, a color reproduction may be made. The fact that the bill is partially obscured in the photographs or even in the negatives is not dispositive; the statute prohibits making color photographs of even parts of bills for a reason.

The statute at issue in this case is but one part of a comprehensive scheme to be sure; but that cannot render it susceptible to invalidation on the ground that the other portions of the scheme largely meet the governmental interest. The fact that there are other statutes available to punish counterfeiters does not negate the government's interest here; Congress may provide "alternative statutory avenues of prosecution to assure the effective protection of one and the same interest. *United States v O'Brien*, 391 US 367, 380 (1968). This statute protects the gullible as well as the shrewd, and the state need not wait until near perfect forgeries are rolling off the presses to act.

In conclusion, this statute is one weapon in an arsenal designed to deprive would-be counterfeiters and defrauders of the tools of deception and, given the strength of the state interest and the presumption of constitutionality which attaches to an Act of Congress, I believe the color and size requirements are permissible methods of minimizing the risk of fraud as well as counterfeiting, and can have only a minimal impact on Time's ability to communicate effectively.

It may well be, as Time argues, that "Congress can do a much better job in preventing counterfeiting than the present § 4711 and § 504," Br for Appellee 46. The question for us, of course, is not whether Congress could have done a better job, but whether the job it did violates Time's right to free expression. It does not: Time is free to publish the symbol it wishes to publish and to express the messages it wishes to convey by use of that symbol; it merely must comply with restrictions on the manner of printing that symbol which are reasonably related to the strong governmental interests in preventing counterfeiting and deceptive uses of likenesses of the currency.

Accordingly, I concur in the judgment of the Court in part, and dissent in part.

[The opinions of Justice Powell, with whom Justice Blackmun joined, concurring in part and dissenting in part has been omitted]

**Appendix B**  
**Illustrative Material:**  
**Figures 1-16**



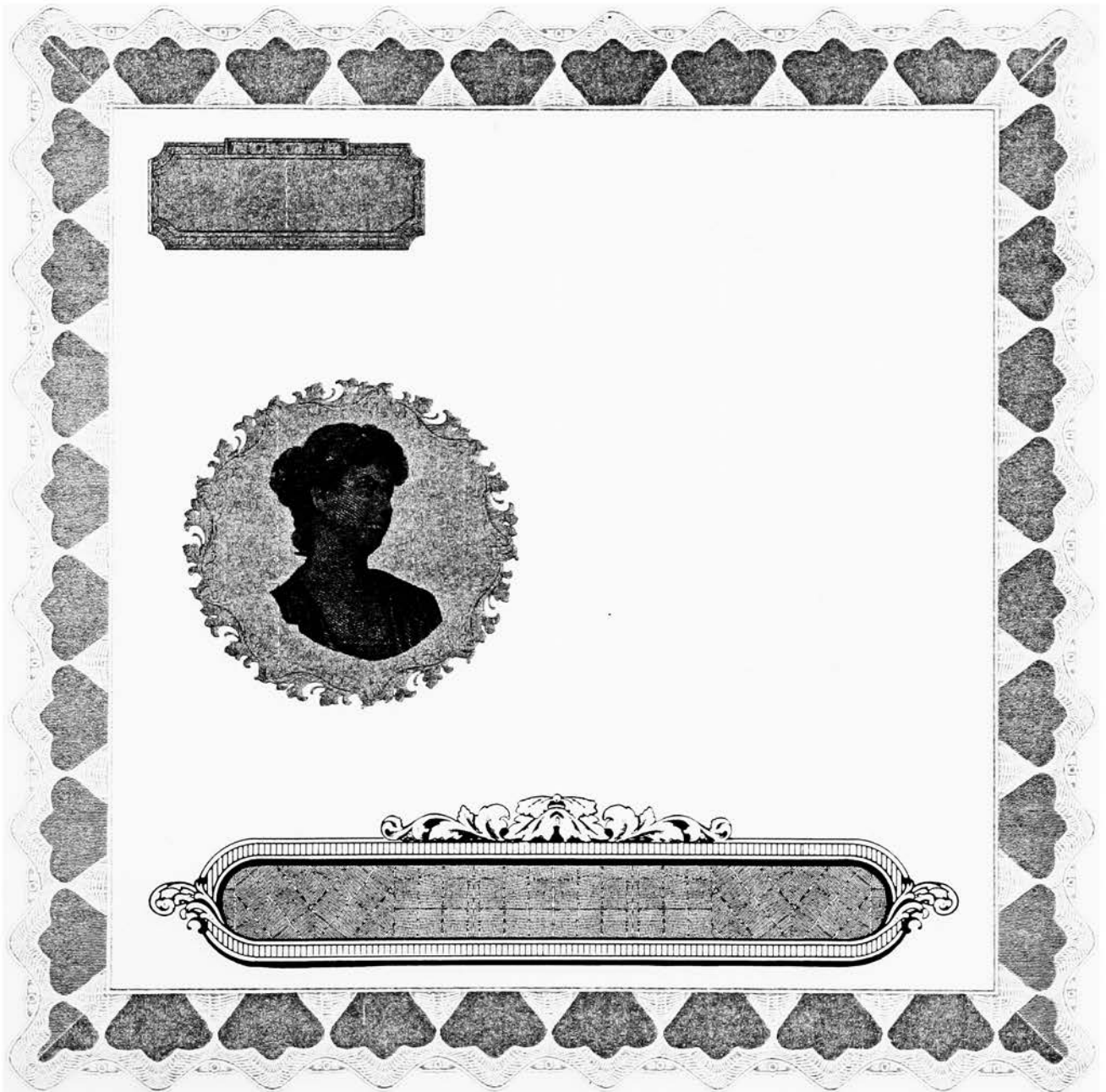
Figure 1

## CONFIDENTIAL PRODUCT: STOCK CERTIFICATE

Printing process making use of the following Patents:

PIGMENT/FLUORESCENCE THRESHOLD MIXING METHOD  
for COUNTERFEIT PROTECTED DOCUMENTS  
U.S.A. PAT # 5,271,645

COUNTERFEIT PROTECTED DOCUMENT  
U.S.A. PAT # 5,018,767 & 5,193,853  
PCT/US90/00221 patent approved



SAMPLE TYPE: ORIGINAL PRINTED PIECE

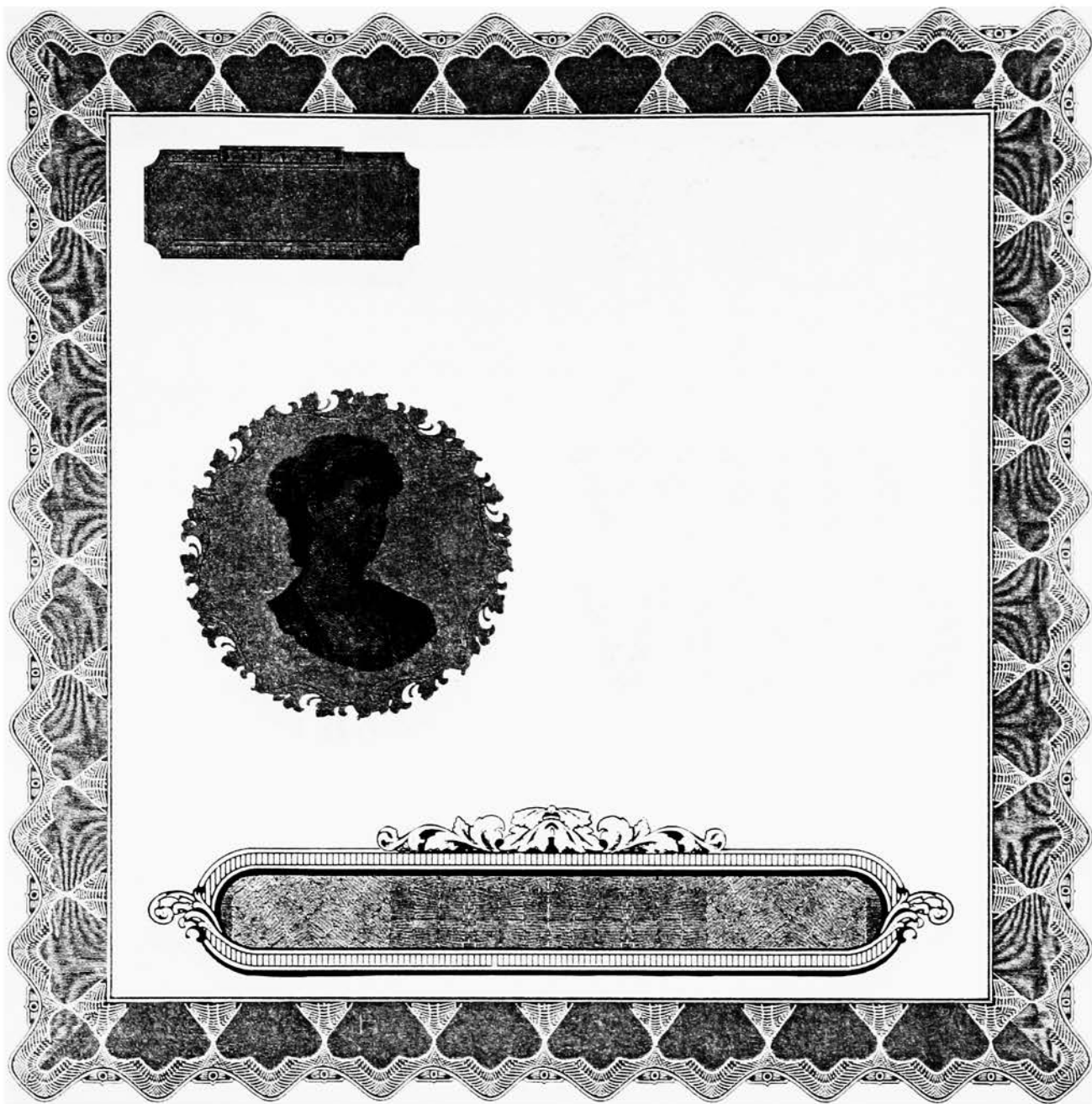
THE WICKER GROUP  
SUITE EIGHT  
194 OXFORD STREET  
ROCHESTER, NEW YORK 14601  
716/271-3078  
fax: 442-1744

Figure 2

U.S.A. PAT.NO. 5,271,645 & 5,018,767 & 5,193,853 & PCT/US90/00221 APPROVED  
Thomas M. Wicker

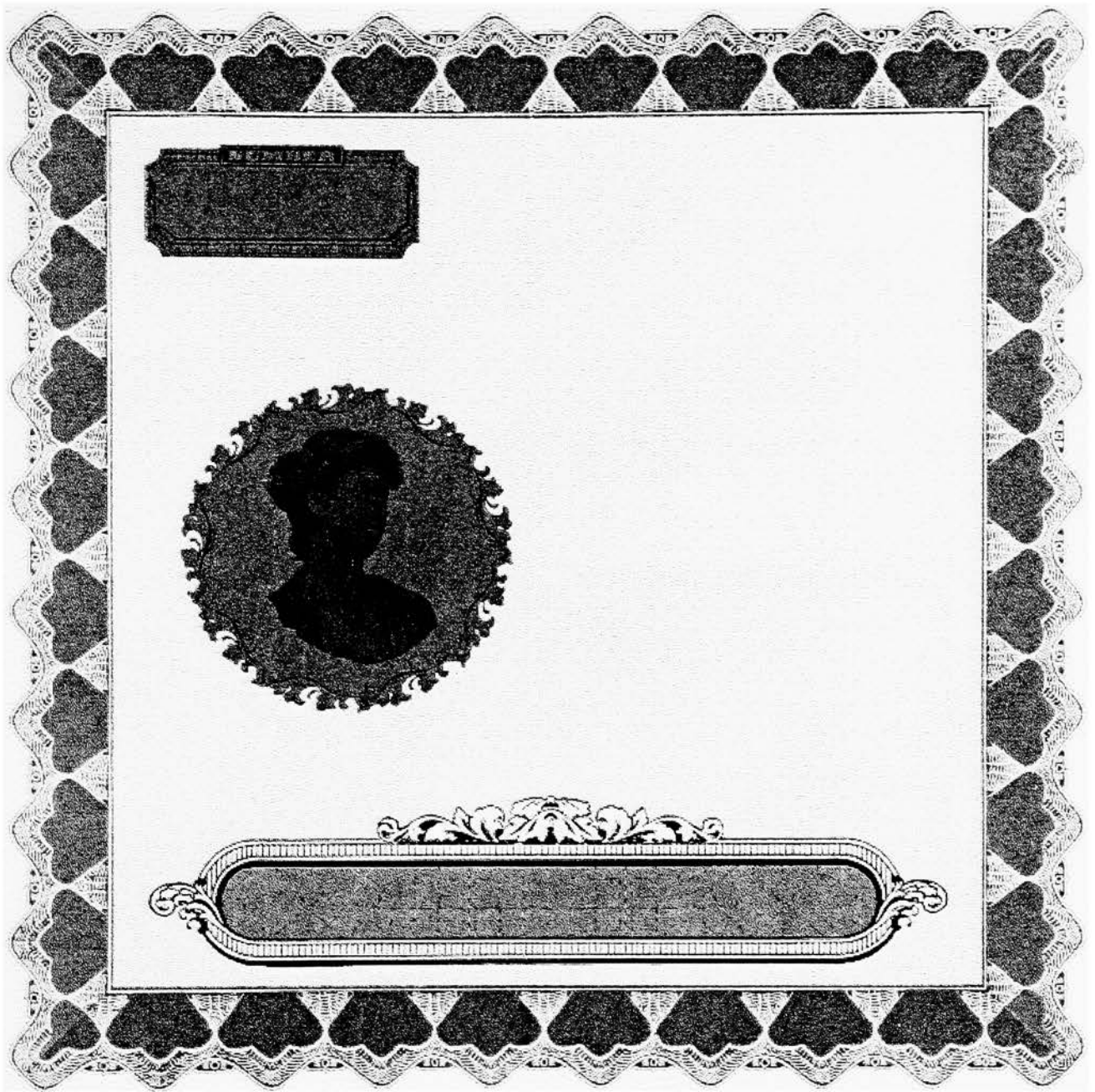
Ralph C. Wicke.





Wicker 5193853  
Scanned on Agfa Horizon  
Resolution: 400 dpi  
150 lpi line screen  
Page Layout: Quark XPress 3.3  
Output: Canon CLC 500/Fiery RIP

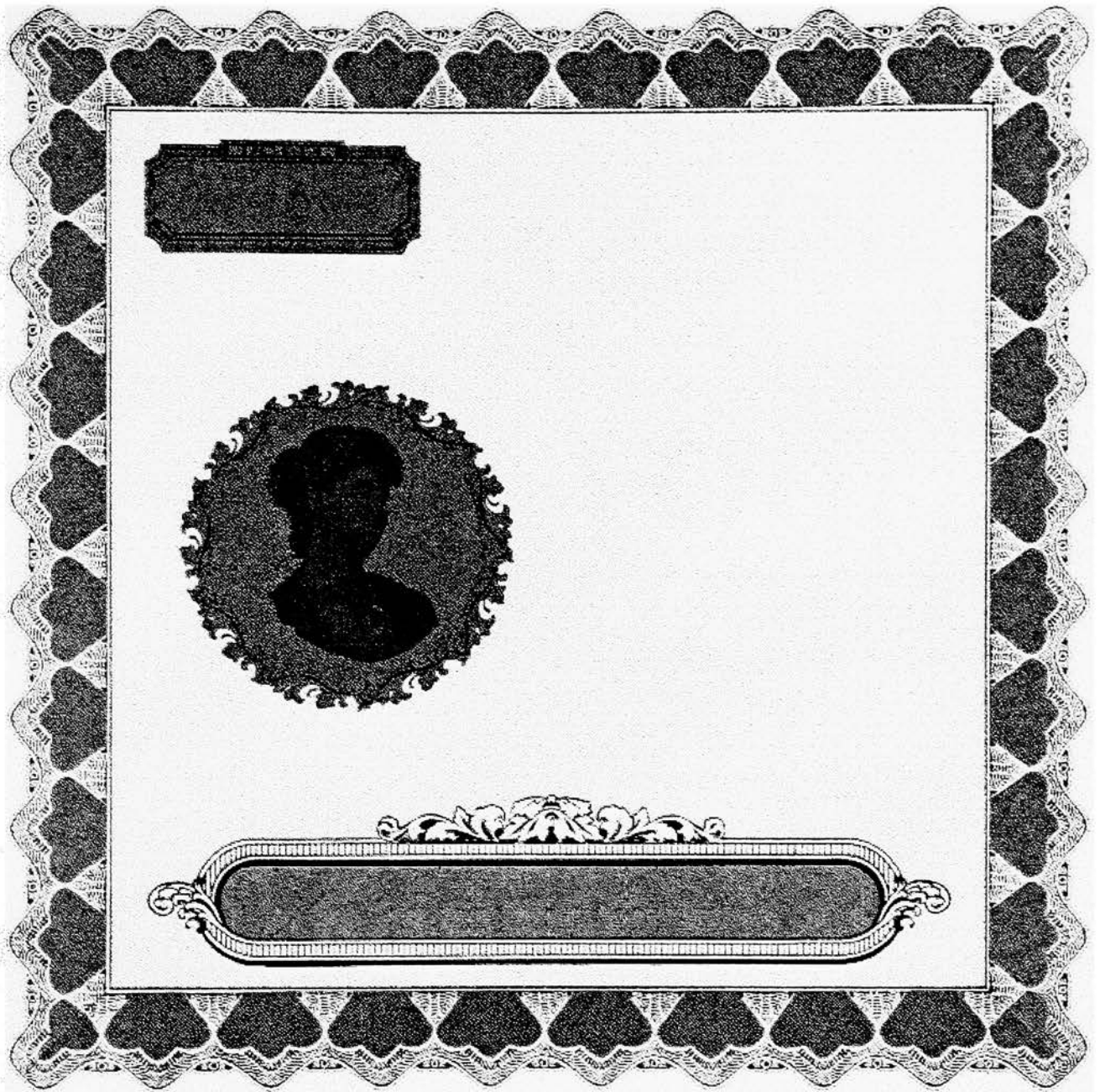
Figure 3



Wicker 5193853  
Scanned on Hewlett Packard Scanjet IIC  
TIFF file/Millions of Colors  
Resolution: 600 dpi  
150 lpi line screen  
Page Layout: Quark XPress 3.2  
Output: Tektronix Phaser IIIpxi

Figure 4

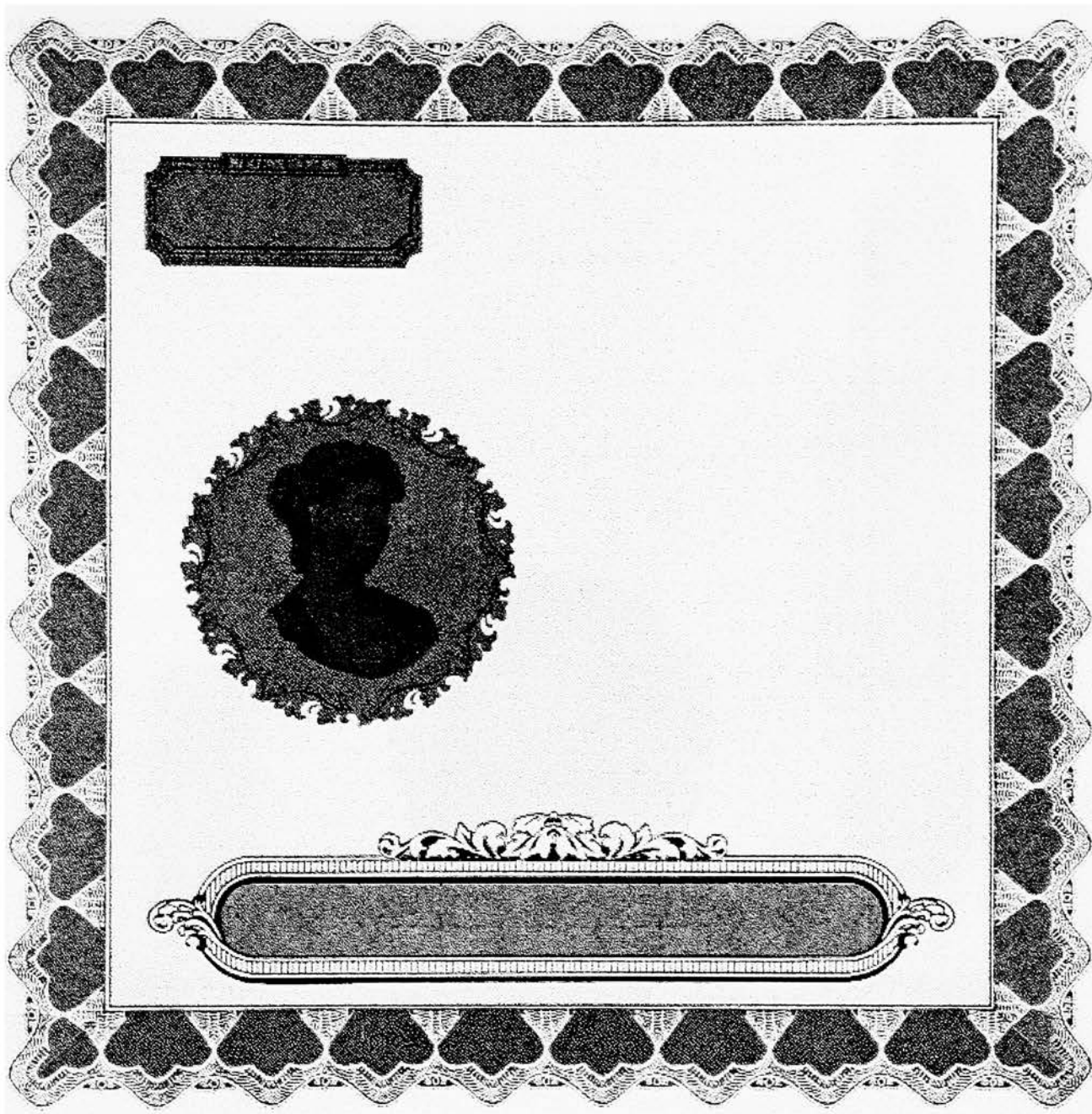




Wicker 5193853  
Scanned on Hewlett Packard Scanjet IIc  
TIFF File/Color Photo  
Resolution: 400 dpi  
150 lpi line screen  
Page Layout: Quark XPress 3.2  
Output: Tektronix Phaser IIIpxi

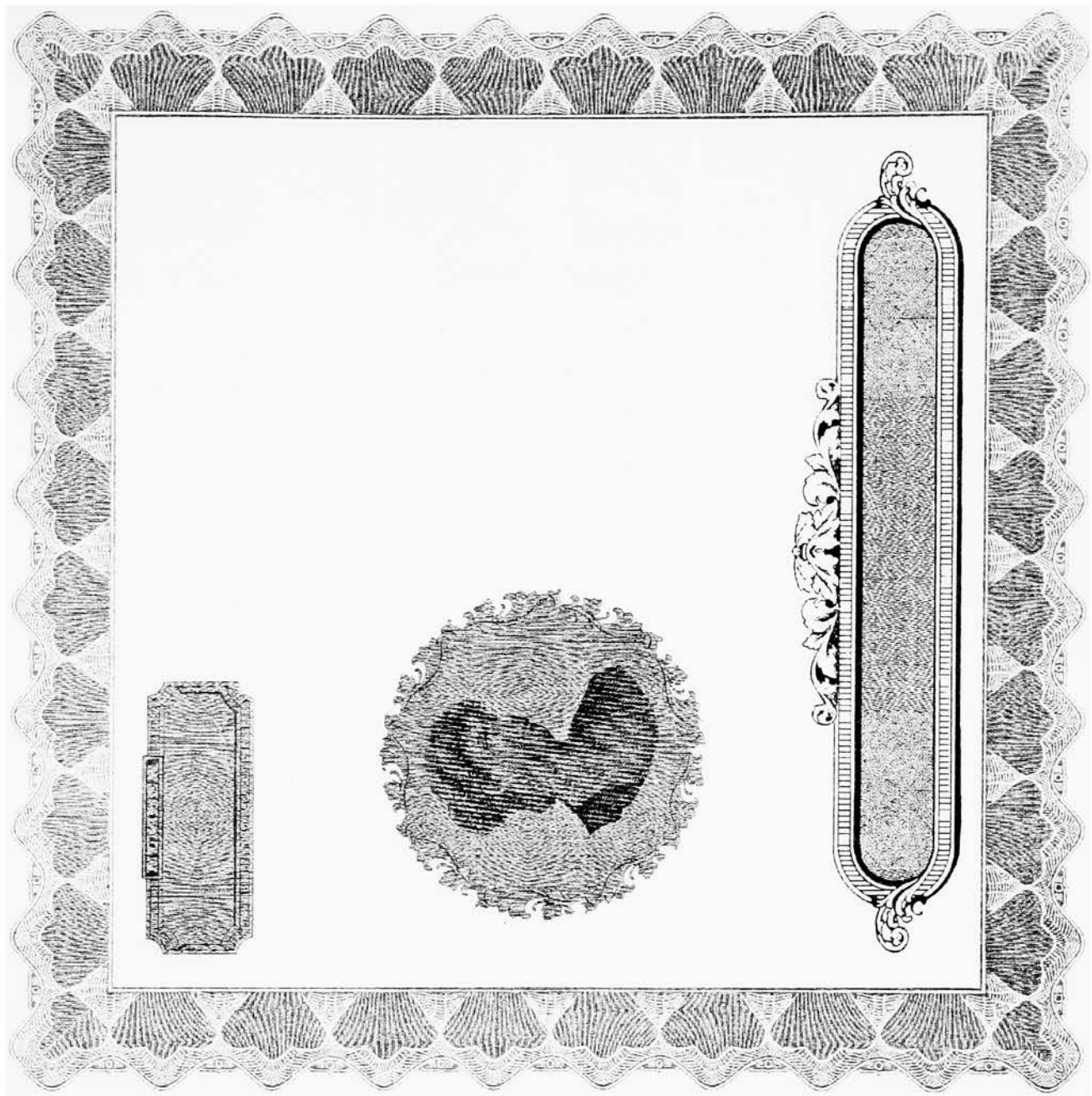
Figure 5





Wicker 5193853  
Scanned on Hewlett Packard Scanjet IIc  
EPS file/Color Photo  
Resolution: 600 dpi  
150 lpi line screen  
Page Layout: Quark XPress 3.2  
Output: Tektronix Phaser IIIpxi

Figure 6



Wicker 5193853  
Scanned on Optronics Color Getter II Pro  
Aperture: 25  
Resolution: 225 dpi  
150 line screen  
Page Layout: Quark XPress 3.2  
Output: Canon CLC 500/Fiery RIP

Figure 7

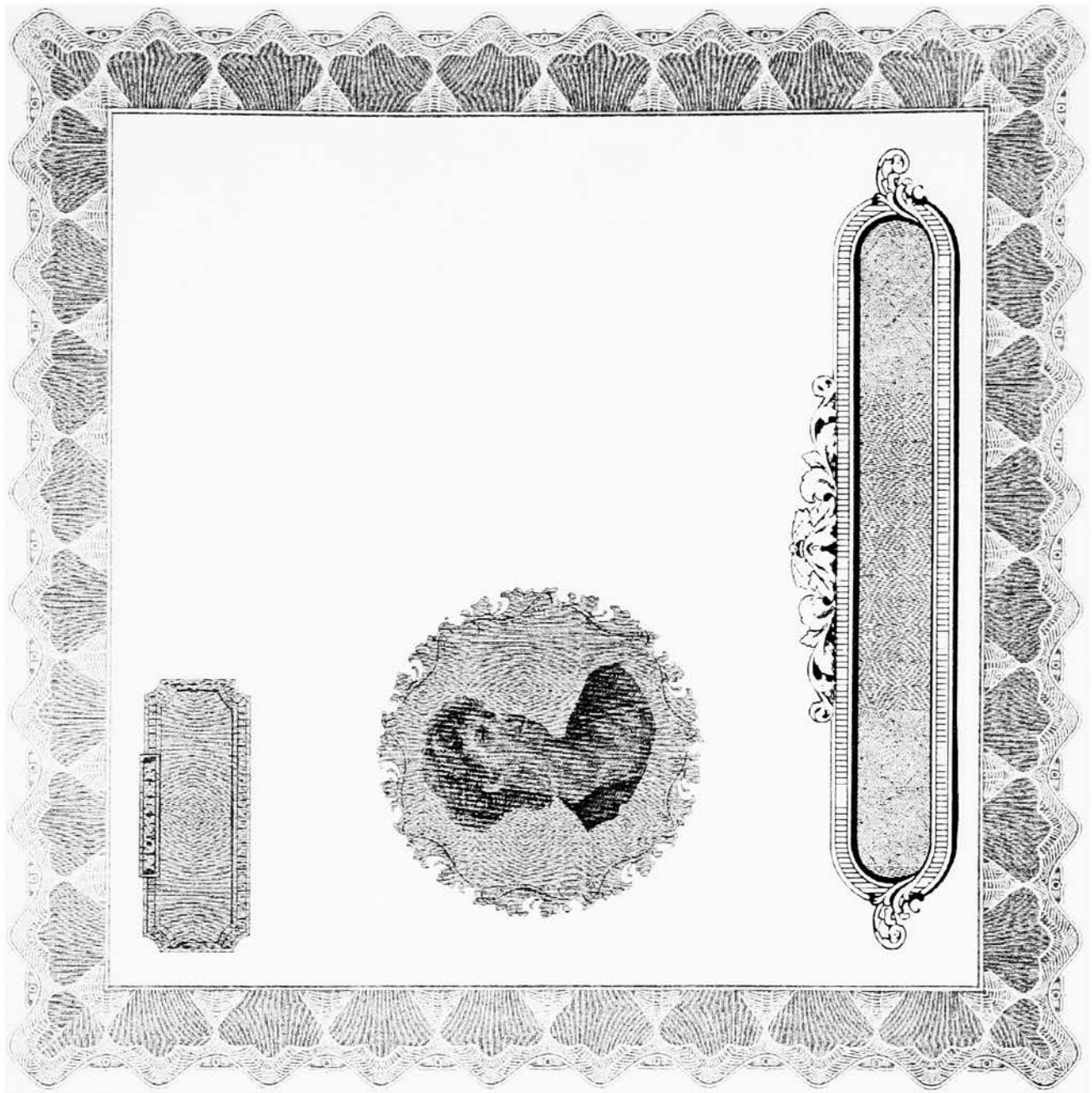
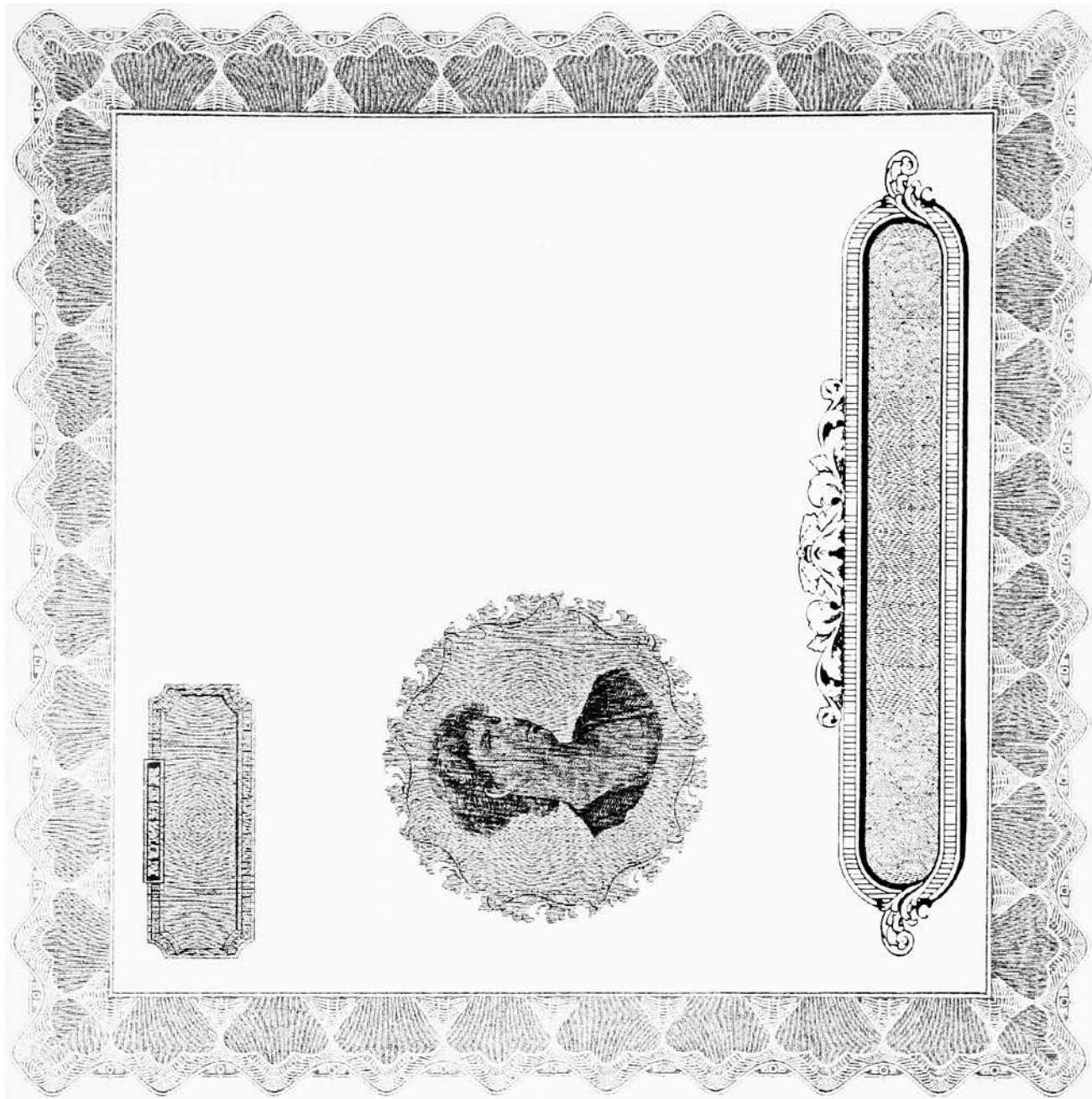


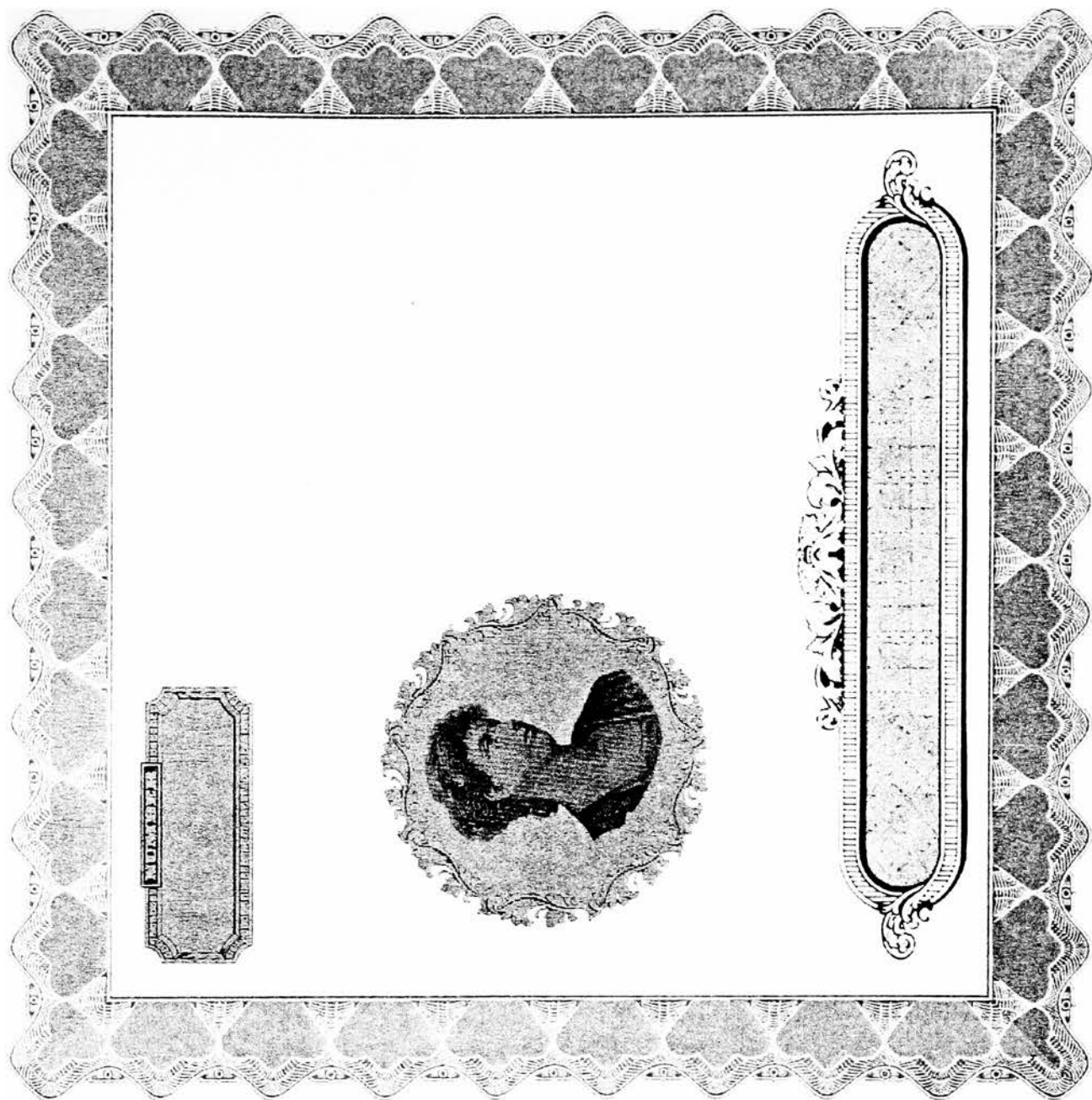
Figure 8

Wicker 5193853  
Scanned on Optronics Color Getter II Pro  
Aperture: 50  
Resolution: 225 dpi  
150 line screen  
Page Layout: Quark XPress 3.2  
Output: Canon CLC 500/Fiery RIP



Wicker 5193853  
Scanned on Optronics Color Getter II Pro  
Aperture: 100  
Resolution: 225 dpi  
150 line screen  
Page Layout: Quark XPress 3.3  
Output: Canon CLC 500/Fiery RIP

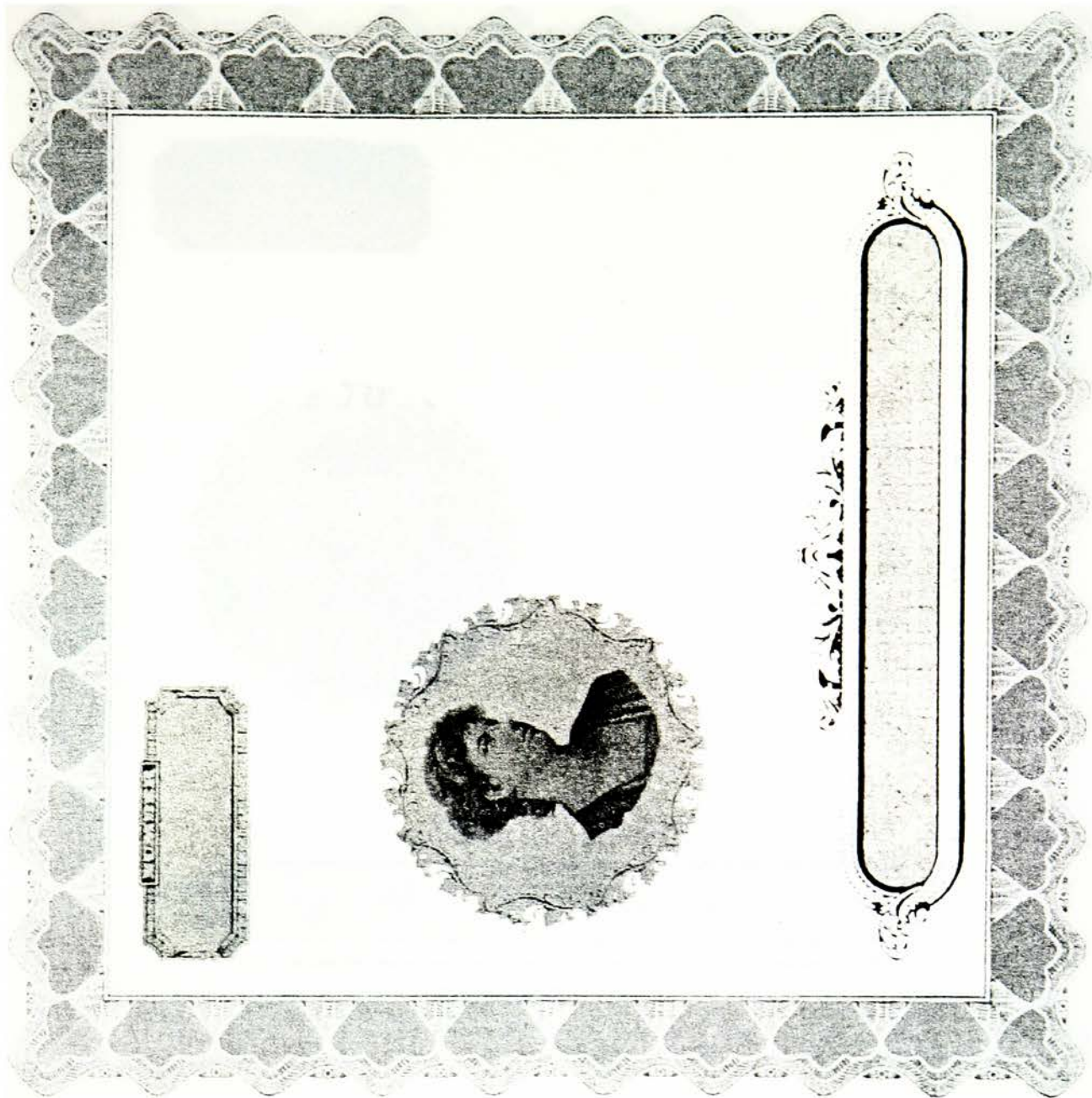
Figure 9



Wicker 5193853  
Scanned on Optronics Color Getter II Pro  
Aperture: 200  
Resolution: 225 dpi  
150 line screen  
Page Layout: Quark XPress 3.2  
Output: Canon CLC 500/Fiery RIP

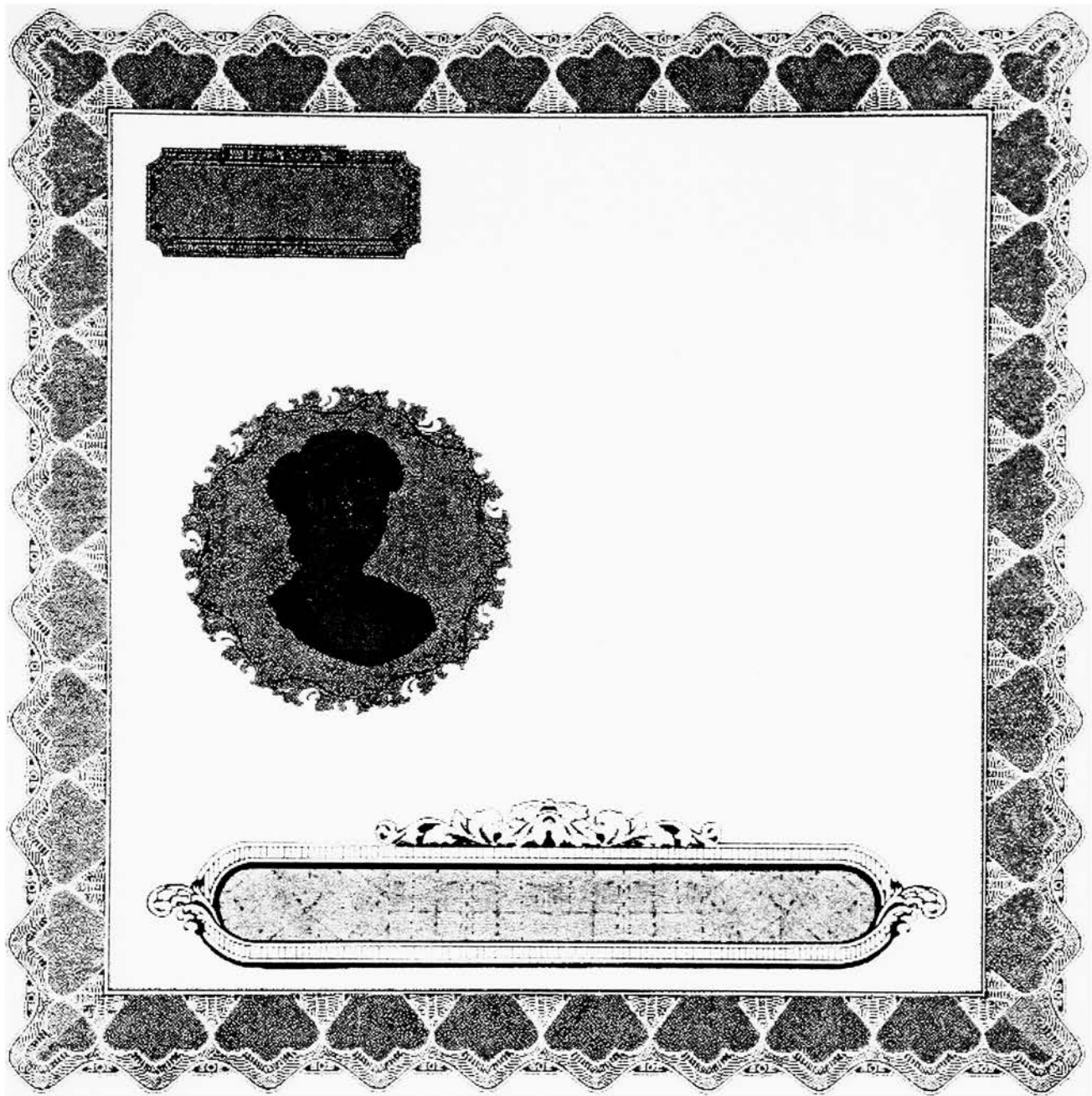
Figure 10





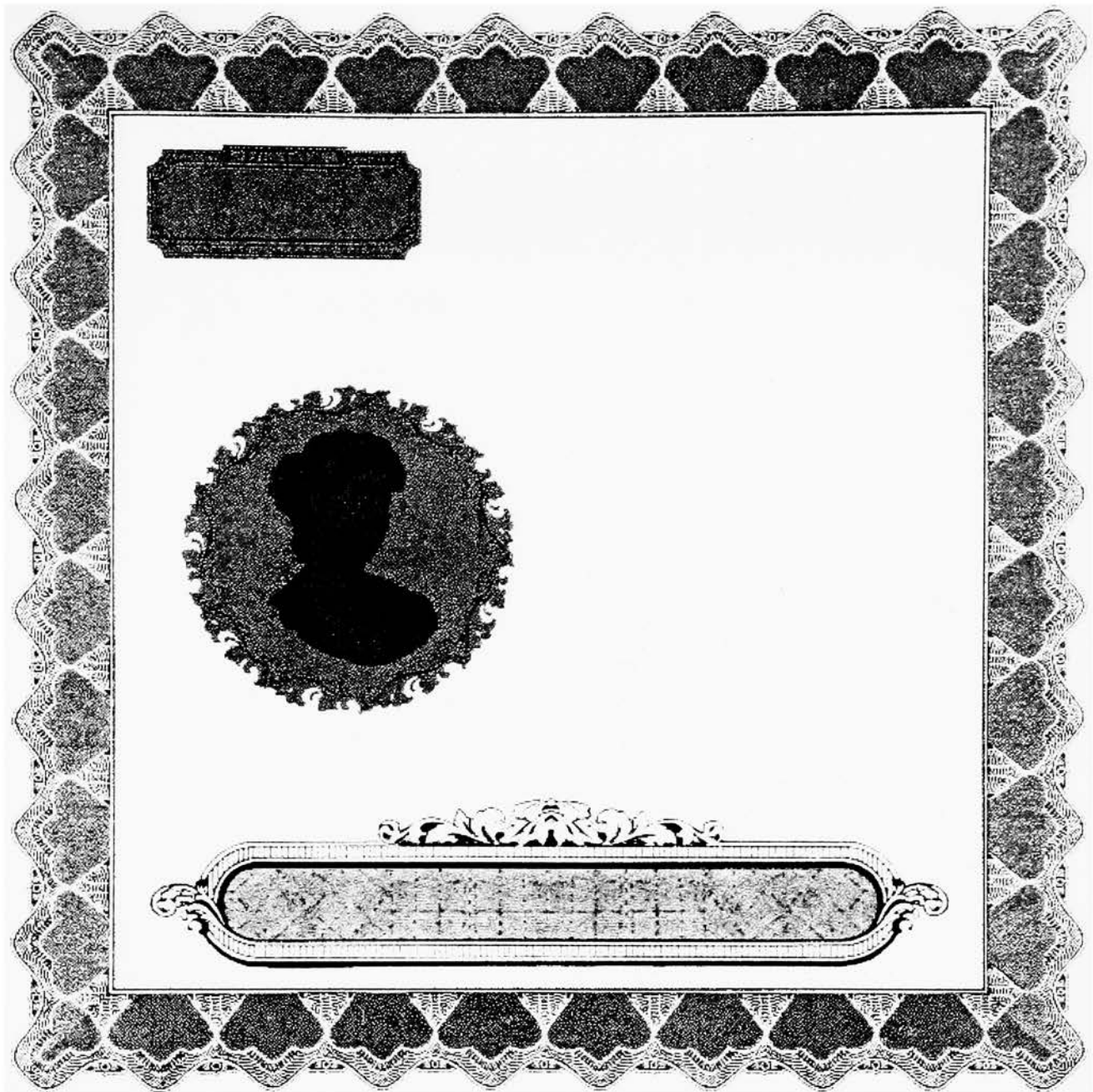
Wicker 5193853  
Scanned on Optronics Color Getter II Pro  
Aperture: 400  
Resolution: 225 dpi  
150 line screen  
Page Layout: Quark XPress 3.2  
Output: Canon CLC 500/Fiery RIP

Figure 11



Wicker 5193853  
Scanned on Hewlett Packard Scanjet IIc  
TIFF File/Color Photo  
Resolution: 400 dpi  
150 lpi line screen  
Page Layout: Quark XPress 3.3  
Output: Canon CLC 500/Fiery RIP

Figure 12



Wicker 5193853  
Scanned on Hewlett Packard Scanjet IIc  
EPS file/Color Photo  
Resolution: 600 dpi  
150 lpi line screen  
Page Layout: Quark XPress 3.3  
Output: Canon CLC 500/Fiery RIP

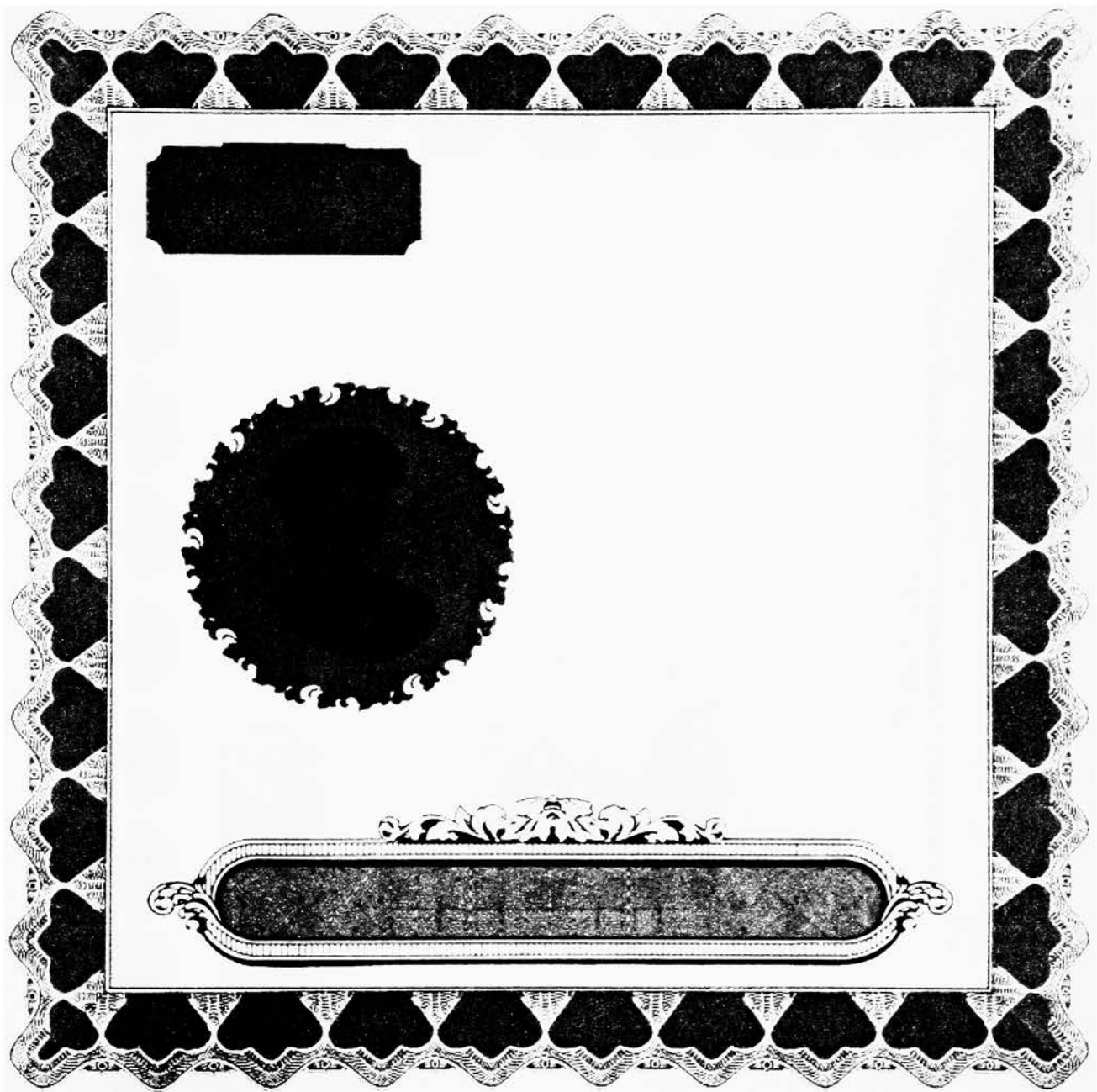
Figure 13





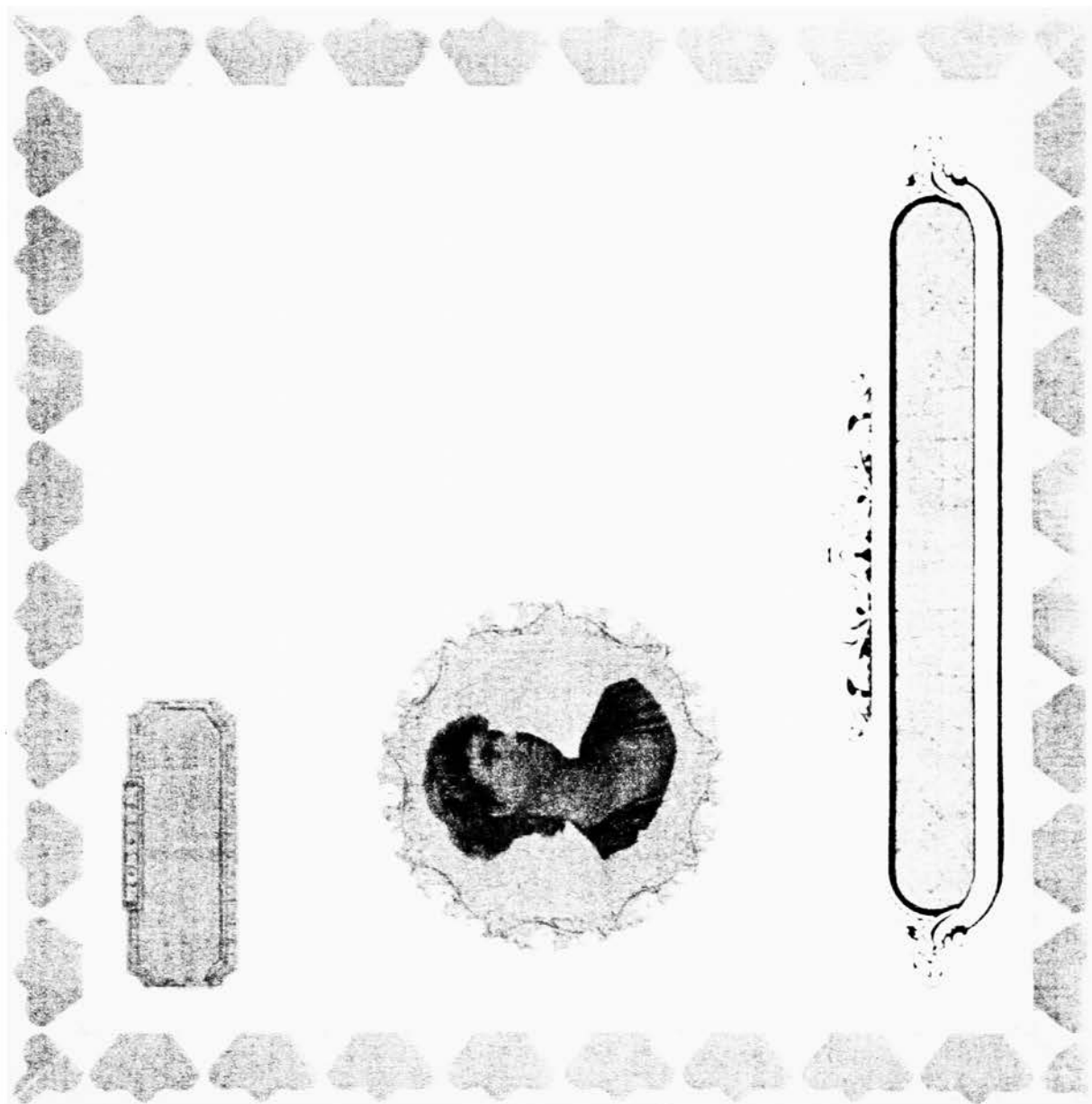
Wicker 5193853  
Scanned on Hewlett Packard Scanjet IIc  
TIFF file/Millions of Colors  
Resolution: 600 dpi  
150 lpi line screen  
Page Layout: Quark XPress 3.3  
Output: Canon CLC 500/Fiery RIP

Figure 14



Wicker 5193853  
Scanned on Hewlett Packard Scanjet IIc  
EPS file/Color Photo  
Resolution: 600 dpi  
150 lpi line screen  
Page Layout: Quark XPress 3.3  
Output: 3M Rainbow Proofer

Figure 15



Wicker 5193853  
Scanned on Optronics Color Getter II Pro  
Aperture: 400  
Resolution: 225 dpi  
150 line screen  
Page Layout: Quark XPress 3.3  
Output: 3M Rainbow Proofer

Figure 16